Supreme Court, U.S.
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No. 94-

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

VICKI G. HUFNAGEL, M.D.,

Petitioner,

vs.

MEDICAL BOARD OF CALIFORNIA,

Respondent.

# APPENDIX
# (VOLUME I)

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December 2, 1994
(Originally Submitted)

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| Appendix | Document |
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| A1 | CALIFORNIA SUPREME COURT DENIAL OF PETITION FOR REVIEW FILED SEPTEMBER 7, 1994 |
| A2 | COURT OF APPEAL, STATE OF CALIFORNIA, SECOND APPELLANT DISTRICT DENIAL OF REQUEST TO EXTEND TIME TO FILE PETITION FOR REHEARING DATED JULY 11, 1994 |
| A3-A59 | APPEAL TO COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLANT DISTRICT, DIVISION FIVE, FROM JUDGMENT OF SUPERIOR COURT OF LOS ANGELES, DATED JUNE 23, 1994 |
| A60-A61 | NUNC PRO TUNC ORDER FROM SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES DATED JUNE 26, 1990, CORRECTING MINUTE ORDER OF MAY 18, 1990 |
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| A68-A213 | TRANSCRIPT OF PROCEEDINGS BEFORE HONORABLE DAVID YAFFE, JUDGE, SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, DATED MAY 18, 1990 |

Second Appellate District, Division Five,
No. B053881
S041273

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

**IN BANK**

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VICKI GEORGE HUFNAGEL,

Appellant

v.

MEDICAL BOARD OF CALIFORNIA,

Appellant

SUPREME COURT
FILED
SEP. 7, 1994
Robert Wandruff, Clerk
Deputy

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Petition for review DENIED.

MOSK
Acting Chief Justice

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
JOSEPH A. LANE, CLERK

DIVISION: 5 DATE: 07/11/94

Frisenda, Quinton & Nicholson
Frank Frisenda
11755 Wilshire Blvd.
10th Floor
Los Angeles, CA 90025

RE: Hufnagel, V. Georges
vs.
State of California
2 Civil B053881
Los Angeles NO. C730624

THE COURT:

APPELLANT'S REQUEST TO EXTEND TIME TO FILE PETITION FOR REHEARING DENIED.

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

| | | |
|---|---|---|
| VICKI GEORGE HUFNAGEL,<br><br>Plaintiff and Appellant,<br><br>MEDICAL BOARD OF CALIFORNIA,<br><br>Defendant and Appellant. | ) | B053881<br>(Sup.Ct.No. C730624)<br><br>COURT OF APPEAL<br>SECOND DISTRICT<br>F I L E D<br>JUNE 23, 1994<br><br>Joseph A. Lane, Clerk<br><br>I. Carter, Deputy Clerk |

APPEAL from a judgment of the Superior Court of Los Angeles County, David P. Yaffe, Judge. Reversed.

Galam & Taraska, Mike Taraska and Frank Frisenda, Jr. for plaintiff and Appellant.

Daniel E. Lungren, Attorney General, and Antonio J. Merino, Deputy Attorney General, for Defendant and Appellant.

Vicki George Hufnagel, M.D. and the Medical Board of California (formerly Board of Medical Quality Assurance) appeal from a judgment granting in part Dr. Hufnagel's petition for writ of mandate under Code of Civil Procedure section 1094.5 ordering the Board to set aside its decision revoking Dr. Hufnagel's license to practice medicine. We conclude the trial court erred in determining that the Board's findings were insufficient. Therefore, we reverse and remand to the trial court for further proceedings.

## FACTS AND PROCEDURAL BACKGROUND

In 1977, Dr. Hufnagel was licensed by the Board as a physician and surgeon. Dr. Hufnagel's specialty is

obstetrics/gynecology.

On February 26, 1987, the Executive Director of the Board filed its accusation against Dr. Hufnagel, charging her with unprofessional conduct based on her treatment of, and billings for, a total of 13 patients. Dr. Hufnagel was accused of gross negligence and incompetence[1] with respect to her treatment of seven patients (Marsha C., Jolina C., Rama H., Jan L., Christine S., Joan T. and Marsha W.). She was accused of dishonesty or corruption[2] with respect

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[1] Unprofessional conduct includes gross negligence and incompetence. (Bus. & Prof. Code, § 2234, subds. (b) and (d).)

[2] Unprofessional conduct includes "[t]he commission of any act involving dishonesty or corruption which is substantially related to the qualifications, functions, or duties of a physician and

to her billings for ten patients (Marsha C., Jolina C., Rama H., Joan T., Marsha W., Karen G., Deborah S., Alicia G., Florence C. and Isabell M.) and the consent forms requested of one patient (Debra S.). She was charged with knowingly signing false documents[3] and creating false documents with fraudulent

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surgeon." (Bus. & Prof. Code, § 2234, subd. (e).)

[3] "Violating, attempting to violate, directly or indirectly, or assisting in or abetting the violation of, or conspiring to violate, any provision of this chapter" is also considered to be unprofessional conduct. (Bus. & Prof. Code, § 2234, subd. (a).) "Knowingly making or signing any certificate or other document directly or indirectly related to the practice of medicine . . . which falsely represents the existence or nonexistence of a state of facts, constitutes unprofessional conduct." (Bus. & Prof. Code, § 2261.)

intent[4] in connection with her billings, and in some cases her medical records, for nine patients (Marsha C., Jolina C., Rama H., Marsha W., Karen G., Deborah S., Alicia G., Florence C. and Isabell M.), and the consent form requested of one patient (Debra S.).

It was also alleged Dr. Hufnagel was subject to discipline for repeated negligent acts[5] with respect to her conduct in ten cases (Marsha C., Jolina C., Rama H., Jan. L., Christine S., Joan T., Marsha W., Karen G., Deborah S. and

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[4] "Altering or modifying the medical record of any person, with fraudulent intent, or creating any false medical record, with fraudulent intent, constitutes unprofessional conduct." (Bus. & Prof. Code, § 2262.)

[5] Unprofessional conduct includes repeated negligent acts. (Bus. & Prof. Code § 2234, subd. (c).)

Alicia G.), repeated acts of clearly excessive use of diagnostic procedures or treatment[6] with respect to four patients (Jolina C., Jan. L., Christine S. and Alicia G.) and insurance fraud[7] with

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[6] "Repeated acts of clearly excessive prescribed or administering of drugs or treatment, repeated acts of clearly excessive use of diagnostic procedures, or repeated acts of clearly excessive use of diagnostic or treatment facilities as determined by the standard of the community of licensees is unprofessional conduct for a physician and surgeon . . . ." (Bus. & Prof. Code § 725.)

[7] "It shall constitute unprofessional conduct and grounds for disciplinary action, including suspension or revocation of a license or certificate, for a health care professional to do any of the following in connection with his professional activities: Para. (1) Knowingly present or cause to be presented any false or fraudulent claim for the payment of a loss under a contract of insurance. Para.

respect to eleven patients (Marsha C., Jolina C., Rama H., Joan T., Marsha W., Karen G., Deborah S., Alicia G., Florence C., Isabell M. and Debra S.).[8]

A hearing was held before an Administrative Law Judge on 27 separate days beginning on November 16, 1987, and ending with oral argument on October 20, 1988. Both parties were represented by

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(2) Knowingly prepare, make, or subscribe any writing, with intent to present or use the same, or to allow it to be presented or used in support of any such claim." (Bus. & Prof. Code. § 810, subd. (a).)

[8] Dr. Hufnagel was charged with dishonesty and insurance fraud with respect to the billing of Joan T., but not with knowingly making a false document or with making a false document with fraudulent intent. Whether this was an intentional omission or any oversight is unknown. In any event, the Board found no violations with respect to Joan T.

counsel and a substantial amount of evidence, both documentary and oral, was introduced. On December 30, 1988, the Administrative Law Judge issued his 26-page Proposed Decision, encompassing 63 findings of fact. The Proposed Decision found that Dr. Hufnagel had committed several acts of unprofessional conduct. Specifically, the Administrative Law Judge found gross negligence with respect to the treatment of one patient (Rama H.), incompetence with respect to the treatment of two patients (Jan L. and Christine S.), clearly excessive use of diagnostic procedures and treatment with respect to two patients (Christine S. and Alicia G.), knowingly making and signing false documents and creating false medical records with fraudulent intent with respect to the billings for four

patients (Marsha C., Jolina C., Rama H., and Isabell M.), knowingly making a false document with respect to the consent form requested of one patient (Debra S.), dishonesty or corruption with respect to the billings for eight patients (Marsha C., Jolina C., Rama H., Marsha W., Deborah S., Alicia G., Florence C., and Isabell M.) and the consent form requested of one patient (Debra S.), insurance fraud with respect to the billings for seven[9] patients (Marsha C., Jolina C., Rama H., Marsha W., Deborah S., Florence C. and Isabell M) and repeated negligent acts with respect to three patients (Rama H., Christine S. and

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[9] These are seven of the eight patients whose billings supported the findings of dishonesty and corruption. It is possible that the eighth patient, Alicia G., was omitted by typographical error.

Deborah S.) All of these violations had been charged in the accusation.

The Administrative Law Judge also made findings with respect to credibility. Specifically, he identified which experts he found to be more reliable than others. He also found Dr. Hufnagel's testimony "not only lacked credibility, it lacked candor." The Administrative Law Judge found that Dr. Hufnagel "was thoroughly impeached by other witnesses, written records, prior inconsistent statements, conflicting answers to the same questions, and outright lack of forthrightness." Although he found that "[c]ause exist[ed] to suspend or revoke" Dr. Hufnagel's license, the Administrative Law Judge recommended a penalty of five years probation.

The Board voted not to adopt the Administrative Law Judge's Proposed Decision. On March 6, 1989, the Board issued its Notice of Non-Adoption of Proposed Decision, indicating that it would review the transcript of the hearing before the Administrative Law Judge and permitting the parties to present written and oral argument.

On August 14, 1989, the Board issued its decision. In many respects, the Board's decision mirrored the Administrative Law Judge's findings of fact. The Board adopted nearly verbatim the findings of the Administrative Law Judge with respect to the credibility of experts and Dr. Hufnagel, However, the Board's findings differed from those of the Administrative Law Judge in several material respects. In addition to

agreeing with the finding of gross negligence as to Rama H., the Board also found gross negligence with respect to Dr. Hufnagel's treatment of two other patients (Christine S. and Deborah S.). In addition to agreeing with the findings of incompetence as to Jan L. and Christine S., the Board also found incompetence with respect to Dr. Hufnagel's treatment of four other patients (Marshal C., Jolina C., Karen G. and Alicia G.). The Board agreed with one finding of excessive use of diagnostic procedures (Christine S.), yet did not find excessive use of diagnostic procedures with respect to a second patient[10](Alicia G.). The Board agreed

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[10] The Board agreed with the Administrative Law Judge's findings with respect to what actually occurred in the course of Dr. Hufnagel's treatment of

with the Administrative Law Judge as to the five charges of knowingly making false documents and also found that violations to have been established with respect to another patient (Alicia G.). The Board agreed with the Administrative Law Judge as to all nine findings of dishonesty or corruption. Although the Board made some findings that Dr. Hufnagel created false records with fraudulent intent, no findings of statutory violations were explicitly made nor any discipline imposed for these charges. Likewise, the Board made no findings against Dr. Hufnagel and imposed no discipline for the charges of repeated

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the is patient. However, where the administrative Law Judge concluded these facts constituted excessive hospitalization. the Board determined the violation to be incompetence.

negligent acts or insurance fraud.

Not all of the charges found proven by the Board had been expressly charged in the accusation. Specifically, the Board determined that Dr. Hufnagel had been grossly negligent with respect to her treatment of Deborah S. and incompetent in her treatment of Karen G. and Alicia G. Although she had been charged with negligence with respect to these patients, incompetence and gross negligence had not been charged.

The Board did not base its choice of penalty on all of the violations taken together as did the Administrative Law Judge. Nor did the Board impose a penalty with respect to each individual violation. Instead, the Board imposed a penalty based on Dr. Hufnagel's treatment of each individual patient. For example,

for the established charges of incompetence, dishonesty and false documents in connection with patient Marsha C., the Board imposed revocation. For her individual treatment of each of five other patients (Jolina C., Rama H., Christine S., Karen G. and Deborah S.), Dr. Hufnagel's license was separately revoked. For her treatment of each of four other patients (Marsha W., Florence C.m Isabell M. and Debra S.), Dr. Hufnagel's license was suspended for 60 days. For her individual treatment of each of two patients (Jan L. and Alicia G.), Dr. Hufnagel was placed on five years probation, with an additional penalty of 60 days suspension for one patient (Alicia G.)

At Dr. Hufnagel's request, the Board's order was stayed until October

13, 1989, in order for Dr. Hufnagel to file a petition for reconsideration. On October 4, 1989, Dr. Hufnagel filed her petition for reconsideration in which she argued the findings were not supported by the evidence and the penalties imposed were unduly harsh. That same day, Dr. Hufnagel filed with the trial court her petition for writ of mandate under Code of Civil Procedure section 1094.5, and her application for an order staying the Board's decision.[11] On October 12, 1989, a stay was granted. On October 17, 1989, the trial court issued an alternative writ of mandate.

After reviewing the administrative record and the pleadings and hearing argument, the trial court issued its

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[11] The petition for reconsideration was apparently denied.

ruling on May 18, 1990 (amended nunc pro tunc on June 26, 1990), granting the petition in part. The trial court rejected all of Dr. Hufnagel's procedural challenges to the Board's proceedings. It also rejected her claim that the evidence was insufficient to establish the appropriate standard of care. However, the trial court agreed with Dr. Hufnagel's claim that the Board's decision was facially deficient in that it failed to clearly disclose the basis for its ruling. The trial court concluded that certain findings of violations with respect to the treatment of three patients (Marsha C., Jolina C. and Christine S.), were "entirely conclusory." The trial court determined that those findings must have been improperly based upon the expert opinions

of the Board members, and ordered the findings stricken. With respect to findings relating to two other patients(Karen G. and Deborah S.), the trial court concluded that since there was no explanation for the Board's disagreement with the Administrative Law Judge, whose findings were found to have been supported, such findings were defective and they were likewise ordered stricken. All other findings were found to be supported by the weight of the evidence, after independent review of the record, and were sustained.

With respect to penalty, the trial court upheld all findings with respect to one patient whose treatment was the basis for an order of revocation (Rama H.). However, without all of the other findings which supported revocation

orders, the trial court found no basis for revocation. At the hearing, the trial court stated, "I don't think that this court . . . can be certain and this court is not convinced that if Rama H. were the only patient involved in this proceeding, that the [B]oard would have ordered unconditional revocation of the doctor's license to practice medicine."

The trial court issued a writ directing the Board to either strike the improper findings[12] and the revocation and order five years probation, or to modify the decision by replacing the questioned findings with findings setting forth "the

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[12] The particular findings found deficient are numbered IV, VII (Marsha C.), XIII (Jolina C.), XXXI (Christine S.), XLVII (Karen G.) and the last paragraph of L (Deborah S.). They are discussed at length below.

reasons for [the Board's] disagreement with the findings of the Administrative Law Judge and the evidentiary basis for such disagreement." On June 26, 1990, a judgment was entered incorporating these directions. Both parties appealed.

## DISCUSSION

Dr. Hufnagel contends that the trial court erred in failing to strike the Board's decision in its entirety and in allowing the Board to conduct further hearings or impose probation. She contends that the Board denied her due process of law by finding her guilty of violations that had not been charged and by failing to make adequate findings. She argues that the remedy for these violations is to strike the Board's entire decision. The Board contends that

its findings were sufficient and should not have been stricken. It further contends the trial court erred in refusing to uphold the penalty of revocation based on the findings with respect to patient Rama H.

Due Process

When a trial court reviewing an administrative proceeding has rejected a petitioner's due process contentions, the appellate court is to assume that the trial court found all facts necessary for its judgment and must determine whether substantial evidence exists to support the trial court's independent determination that there were no due process violations. (Noguchi v. Civil Service Com. (1986) 187 Cal.App.3d 1521, 1536.) "However, when . . . the evidence

is substantially undisputed and the fair trial issue presents a question of law, we will exercise our own judgment. [Citation.]" (Vollstedt v. City of Stockton (1990) 220 Cal.App.3d 265, 273.) Thus, to the extent Dr. Hufnagel's due process challenges raise issues of fact, we will review the trial court's determination under substantial evidence review. As to issues of law, we will review the decision de novo.

1. Charging Disparity

Dr. Hufnagel contends she "was entirely denied due process at the administrative level" because the Board found that she committed gross negligence with respect to Deborah S., and incompetence with respect to Alicia G.

and Karen G. although those violations had not been charged. "It is well settled . . . that variance between pleadings and proof is not a basis for reversal unless it prejudicially misleads a party. A variance must be disregarded if the issues on which the decision is actually based were fully and fairly tried." (Franz v. Board of Medical Quality Assurance (1982) 31 Cal.3d 124, 143-144.) Applying this standard, the trial court found "[t]he issues complained of were fully and fairly tried, and petitioner's contention is therefore rejected."

The Board concedes that there was no evidence to support its determination of gross negligence with respect to Deborah S. It therefore does not contest the propriety of that part of the trial

court's order striking this finding.

As to the charges of incompetence with respect to Alicia G. and Karen G., substantial evidence exists to support the trial court's conclusion that these charges were fully and fairly tried at the administrative hearing. Dr. Hufnagel's post-hearing brief before the Board clearly demonstrates she not only introduced evidence on the issue of the competence of her treatment of these patients but also argued at length that her treatment of these patients was appropriate. For example, she argued that both Dr. William Hummer and Dr. Frederic Quevedo (her experts) testified there was no deviation from the standard of care with respect to the treatment rendered to Karen G. Dr. Hufnagel was found incompetent because she overreacted

to Karen G.'s low heart rate during surgery by opening her abdomen (performing a laparotomy). Dr. Hufnagel argued that she "did not fail to recognize pre-operative bradycardia [slow heart beat], and the recognition and response to the intro-operative bradycardia was a team response (surgeon, assistant surgeon and anesthesiologist) which was completely within the standard of care." This charge was fully and fairly litigated.

The same is true with respect to patient Alicia G. Dr. Hufnagel was found to have been incompetent because she hospitalized Alicia G., although the latter had exhibited no documented symptoms other than pelvic pain. Dr. Hufnagel's post-hearing brief demonstrates that she offered the

testimony of Dr. Hummer and Quevedor to the effect that hospitalization of Alicia G. was indicated and even "an absolute necessity."

Dr. Hufnagel offers no argument that she was prejudiced by the variance in charges, except to contend that she had no notice of these charges because she was "only . . . charged with violations regarding her billing practices" with respect to these patients. In addition to charges related to her billing practices, however, D. Hufnagel had been charged with "repeated acts of negligence in discharging her duties as a physician and surgeon" with respect to her treatment of both of these patients. Therefore, Dr. Hufnagel's contention that she "was never afforded her due process rights of notice to defend against these

charges is rejected.[13]

The trial court correctly found that the variance between the charges and the findings was not prejudicially misleading and did not deprive Dr. Hufnagel of due

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[13] Dr. Hufnagel was put on notice of her precise actions with respect to Karen G. that later formed the basis of the findings of incompetence. The accusation charged that Dr. Hufnagel's "failure to recognize [Karen G.]'s pre[-]operative bradycardia as reflected in the pulse rates of 44 and 60 constitutes negligence and resulted in an overreaction and immediate laparotomy which was not justified by the transient mild bradycardia of 56." The Board concluded that Dr. Hufnagel "was negligent by failing to recognize this patient's pre[-]operative bradycardia, as reflected by pre-op pulse rates of 44 and 60. It was further established that [Dr. Hufnagel] was incompetent due to over-reacting to the patient's bradycardia, and performing a laparotomy."

process of law.[14]

2. Adequacy of Findings

The trial court found the Board's decision to be facially deficient "to the

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[14] Even if Dr. Hufnagel) were correct that she was denied due process by the variance, she has offered no authority for the proposition that the decision of the Board "should be completely stricken" on account of such error. She relied on Franz v. Board of Medical Quality Assurance, supra, 31 Cal.3d 124, for support. Yet Franz merely held that when an agency has imposed a single discipline for multiple charges, some of which are not supported by the evidence, and there is real doubt whether the same penalty would have been imposed on the proper findings, "the matter will be returned to the agency for redetermination of penalty." (Id. at p. 145.) Neither Franz nor any authority disclosed by independent research supports the conclusion that proper findings must also be stricken when it is determined that some of the Board findings were inappropriate.

extent that the final decision of [the Board] differs from the recommended decision of the Administrative Law Judge." Dr. Hufnagel contends that this finding should have resulted in the Board's decision being struck in its entirety. The Board contends that the trial court erred in finding its decision to be deficient. Because we find the Board to be correct in this respect, it is unnecessary to reach Dr. Hufnagel's contention regarding the appropriate remedy.

Any variation between the Administrative Law Judge's decision and the Board's decision is of no relevance. "[F]rom the moment of the agency's rejection thereof, [the Administrative Law Judge's decision] serves no identifiable function in the

administrative adjudication process or, for that matter, in connection with the judicial review thereof," (Compton v. Board of Trustees (1975) 49 Cal.App.3d 150, 158.) Thus, the trial court erred in comparing the Board's final decision to the Administrative Law Judge's decision. The only scale against which the Board's decision is to be measured is that provided by statute and case law.

a. The Topanga Standard

The California Supreme Court set forth the appropriate standard of review for an administrative agency's findings in Topanga Assn. for a Scenic Community v. County of Los Angeles, (1974) 11 Cal.3d 506. When an agency's decision is challenged in a mandamus proceedings under Code of Civil Procedure section

1094.5, that statute "clearly contemplates that at minimum, the reviewing court must determine both whether substantial evidence supports the administrative agency's findings and whether the findings support the agency's decision." (Id. at pp. 514-515.) The Supreme Court in Topanga concluded that "implicit in [Code of Civil Procedure] § 1094.5 is a requirement that the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order. If the Legislature had desired otherwise, it could have declared, as a possible basis for issuing mandamus, the absence of substantial evidence to support the administrative agency's action. By focusing, instead, upon the relationships

between evidence and findings and between findings and ultimate action, the Legislature sought to direct the reviewing court's attention to the analytic route the administrative agency traveled from evidence to action. In so doing, we believe that the Legislature must have contemplated that the agency would reveal this route. Reference, in [Code of Civil Procedure] § 1094.5, to the reviewing court's duty to compare the evidence and ultimate decision to 'the findings' . . . we believe leaves no room for the conclusion that the Legislature would have been content to have a reviewing court speculate as to the administrative agency's basis for decision." (Id at p. 515; see Securities Comm'n v. Chenery Corp. (1943) 318 U.S. 80, 94 ["the orderly functioning of the

process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained"].)

Topanga's mandate is violated when the administrative agency merely "provides a pudding of evidentiary facts and concludes without analysis that there are plums somewhere in it demonstrating violation[s]." (American Funeral Concepts v. Board of Funeral Directors & Embalmers (1982) 136 Cal.App.3d 303, 314.) Likewise, if the agency's findings are legally insufficient to support its conclusion that a particular statutory offense occurred, Topanga is violated by a trial court's attempt to uphold the final result by "cutting and pasting its premise upon [the] agency determination founded on a different premise."

(American Funeral Concepts v. Board of Funeral Directors & Embalmers, supra, 136 Cal.App.3d at p. 311.) This is so because the purpose of Topanga is to guarantee that when a reviewing court upholds an agency's determination, it does so on the same theory used by that agency.

The findings need only disclose the basis on which the Board's final decision was made. (Pick v. Santa Ana-Tustin Community Hospital (1982) 130 Cal.App.3d 970, 978.) "Though the reviewing court might prefer to have the grounds for the board's determination stated in complete detail. . . . we cannot imply the necessity for such detailed findings in the absence of a statutory requirement." (Webster v. Board of Dental Examiners (1941) 17 Cal.2d 534, 543-544; see also

Savelli v. Board of Medical Examiners (1964) 229 Cal.App.20 124, 134-135.)

To satisfy Topanga, the findings need not be as formal as those in a judicial proceeding. "It is sufficient that the findings enable the reviewing court to determine that the agency found the necessary facts to support its determination of the issues." (Kateen v. Department of Real Estate (1985) 169 Cal.App.3d 481, 485.)

Although findings may be supplemented by reference to the administrative record itself, (Kateen v. Department of Real Estate, supra, 169 Cal.App.3d at p. 485), it is not necessary for them to be so supplemented. The trial court's review of the evidence in a case such as this where a fundamental vested right is at issue is

an independent review of the evidence. (Kearl v. Board of Medical Quality Assurance (1986) 189 Cal.App.3d 1040, 1052.) Thus, the trial court is not, in its review of the evidence, restricted to the evidence relied upon by the Board, but must instead review the entire record to determine if the weight of the evidence supports the Board's findings. (Id. at p. 1056.) The Board's decision must contain findings of fact sufficient to enable the trial court to review the evidence to determine if it supports the findings, and to determine whether the findings support the Board's ultimate action, but there is simply no requirement that the Board cite to the specific evidence on which it relied.

b. The Board's Findings

Evaluated against this standard, the Board's findings were sufficient, and the trial court erred in concluding otherwise. With one exception, each challenged finding specifies the conduct of Dr. Hufnagel which was found to be inappropriate, and the manner in which it was found inappropriate.

Findings IV and VII related to the treatment of Marsha C. This patient had previously undergone, with another physician, a suction curettage for an incomplete abortion. Dr. Hufnagel diagnosed post-operative complications and a possible perforation. When she performed surgery, seven days after the initial operation, she reported evidence of a uterine perforation and attempted repair. The findings state that "[i]t was established that [Dr. Hufnagel]'s

attempt to suture the laceration and perforation on this asymptomatic post-abortal patient seven days after the previous procedure constitutes incompetence," and "[i]t was established that [Dr. Hufnagel]'s performance of a uterine suspension on this patient in the face of uterine inflammation and potential infection constitutes incompetence." A trial court is given sufficient guidance from these findings to determine exactly what the evidence must have established.[15] In reviewing

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[15] Indeed, there were findings with respect to this patient that identify conduct that was not proven to be gross negligence or incompetence. Thus, the trial court would not be able to support the Board's ultimate conclusion of incompetence even if, upon independent review, it concluded that these other charges were supported by the evidence.

the evidence, the trial court will be required to determine if it supports the factual predicates, e.g., did Dr. Hufnagel perform the procedures; was the patient's condition as stated; and whether those factual predicates support the ultimate factual findings, e.g., was this conduct incompetent. These findings are therefore sufficient under Topanga.

Finding XIII relates to the treatment of Jolina C. Jolina C. had been admitted to the hospital by another physician. Dr. Hufnagel performed a liver biopsy and a laparoscopy (diagnostic examination of the interior of the abdomen). The following day, further surgical procedures were performed. The finding states that "performing two non-emergency surgeries on two consecutive days under the

circumstances constitutes incompetency." This finding is preceded by findings specifying which procedures were performed on which days, and why some procedures were not performed until the second day. These findings are of sufficient specificity to enable a reviewing court to determine whether they are appropriately supported by the evidence, and are therefore sufficient.

Finding XXXI related to the treatment of Christine S. Dr. Hufnagel admitted this patient to the hospital with a diagnosis of pelvic pain and pelvic mass. She ordered a series of laboratory tests for the patient and performed a diagnostic laparoscopy followed by a laparotomy. During the laparotomy, Dr. Hufnagel made a large cut in the uterus and perform a biopsy. Dr.

Hufnagel repaired the uterus and performed a uterine suspension. The finding states "[i]t was established that respondent was negligent in performing the uterine suspension." Finding XXXI does not specify whether Dr. Hufnagel was found negligent in the manner in which she performed the uterine suspension or in her decision to perform it under the circumstances. The ambiguity in this finding would make it possible for a reviewing court to uphold the finding of negligence on a theory different from that relied upon by the Board. Thus, the finding is improper under Topanga. However, any error in this finding is harmless because negligence is not among the statutory violations for which Dr. Hufnagel was punished with respect to this patient. The Board ordered

revocation because Dr. Hufnagel's conduct with respect to Christine S. established gross negligence, incompetence and repeated acts of clearly excessive use of diagnostic procedures.[16] Because no penalty was imposed for the preliminary finding of negligence, whether that finding can be supported is irrelevant.

The above findings (relating to

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[16] The findings with respect to these other courts are clearly specific enough to allow for review. Gross negligence is based on the finding that "after hearing the true diagnosis of ad[e]nomysis [ingrowth of the uterine mucous membrane into the uterine musculature], [Dr. Hufnagel] wedged out further uterine tissue." Incompetence was based on Dr. Hufnagel's excision of "ugly fatty adhesions from the posterior fundus for cosmetic purposes," which was found to be "not appropriate" and "would further increase the patient's risk of more adhesions."

Marsha C., Jolina C. and Christine S.) were determined to be conclusory. The trial court assumed these findings were improperly based on the expert opinions of members of the Board, as was the case in Franz v. Board of Medical Quality Assurance, supra, 31 Cal.3d at page 138. The Franz court concluded this was improper without complete and specific notice to the doctor and an opportunity for the doctor to respond. (Id. at pp. 139-140.) Here, unlike Franz, the Board did not purport to rely on its own medical expertise, but instead simply reached different conclusions from those of the Administrative Law Judge on the same evidence. The Board's findings are sufficient under Topanga and it therefore falls to the trial court to independently review the administrative record to

determine if these findings are supported by the evidence.

Additionally, the trial court found two findings insufficient solely because they were contradictory to the findings of the Administrative Law Judge. (The Board has conceded that one such finding is not supported by the evidence and is therefore in error. Thus the propriety of the trial court's decision striking this finding, the last paragraph of finding L. is not before us.) The trial court concluded that the Administrative Law Judge's findings were supported by the testimony of Dr. Hummer. In the absence of any explanation of the Board's "disagreement with said findings and testimony," the Board's findings to the contrary were ordered stricken. As discussed above, this reasoning is faulty

because the Administrative Law Judge's decision has been rendered a nullity by the Board's nonacceptance of it. The trial court should have simply determined whether the findings of the Board were sufficient to provide for review, and if so, to review them.

Finding XLVII states that "[i]t was established that [Dr. Hufnagel] was negligent by failing to recognize [Karen G.]'s pre[-]operative bradycardia, as reflected by pre-op pulse rates of 44 and 60. It was further established that [Dr. Hufnagel] was incompetent due to over-reacting to the patient's bradycardia, and performing a laparotomy. It was also incompetence to continue with multiple surgical procedures when the presumptive diagnosis was that of bradycardia." This finding is clear sufficient to give

notice as to the rationale for the Board's decision and to allow appropriate review.

With the exception of finding XXXI, for which no discipline was imposed, all of the challenged findings were sufficient. The trial court therefore erred in ordering these findings stricken. Thus, we will remand to the trial court so that it can determine whether all of the findings are supported by the evidence and whether the finding support the Board's decision.

3. Standard of Care

Dr. Hufnagel also contends that the Board's decision was improper because it did not set forth any facts defining the applicable standard of care against which her conduct was measured. Yet such

findings are readily implied from the Board's decision.[17] When the Board concluded that Dr. Hufnagel's actions constituted gross negligence, the Board impliedly concluded that Dr. Hufnagel's conduct was either an extreme departure from the standard of practice or a lack of even scant care. (See Gore v. Board of Medical Quality Assurance (1980) 110 Cal.App.3d 184, 197 [defining gross negligence].) Whether there was sufficient evidence in the record to support this evaluation of Dr. Hufnagel's

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[17] A review of the sufficiency of an agency's findings is not limited to the four corners of the agency's decision. (City of Carmel-By-the-Sear v. Board of Supervisors (1977) 71 Cal.App.3d 84, 91-91 [oral remarks made at the hearing, if taped and reduced to a written transcript, can contain findings sufficient to satisfy Topanga.)

conduct is a question for the trial court, in the first instance, to be determined on the exercise of its independent judgment. There is no necessity that explicit findings regarding the standard of care be included in the Board's decision in order to meet the requirements of Topanga.

Dr. Hufnagel recognizes this in her contention that case law mandates "that any findings of the [Board] pursuant to its allegations concerning a breach of the community standard and/or incompetence necessitate the existence of evidence establishing such standard." Indeed, Dr. Hufnagel's contention is not that the findings are insufficient to allow the trial court to perform a proper review, but rather that the findings are not supported by the evidence. To the

extent that the trial court considered this contention, it was rejected. The trial court concluded that "[a]n examination of the transcript of the administrative proceedings discloses . . . that the applicable standards of care were well articulated by the witnesses."[18] However, because the trial court did not evaluate the evidence with respect to the findings it erroneously found to be insufficient, we will remand for the court to exercise its independent judgment as to whether all of the findings are supported by the weight of

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[18] Nor is it always necessary for expert testimony to establish the standard of care. When the questions do not require medical expertise, common sense and lay knowledge can provide the basis for a finding of medical negligence. (Franz v. Board of Medical Quality Assurance, supra, 31 Cal.3d at p. 141.)

the evidence.[19]

Penalty

A trial court reviews the penalty imposed by an administrative board under an abuse of discretion standard. It must allow the penalty to stand unless it is unsupported by the findings, grossly excessive, arbitrary, capricious or a manifest abuse of discretion. (Williamson v. Board of Medical Quality Assurance (1990) 217 Cal.App.3d 1343,

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[19] While we here reviewing the trial court's determination that the evidence was sufficient to support this finding, Dr. Hufnagel would be required to show that no substantial evidence supports the trial court's conclusion. (Kearl v. Board of Medical Quality Assurance, supra, 189 Cal.App.3d 1040, 1052; Gore v. Board of Medical Quality Assurance, supra, 100 Cal.App.3d at p. 193.)

1347; Richardson v. Board of Supervisors (1988) 203 Cal.App.3d 486, 495.) Even if the penalty is found to be an abuse of discretion, the trial court cannot fix the penalty, but can only remand with directions to issue a fair penalty less then the one found to be excessive. (Richardson v. Board of Supervisors, supra, 203 Cal.App.3d at p. 495.)

If a trial court has determined on an exercise of its independent judgment that the evidence supports the findings of the Board, the question of whether the Board abused its discretion in setting the penalty is one of law. (Williamson v. Board of Medical Quality Assurance, supra, 217 Cal.App.3d at p. 1356.) If, however, the Board has imposed a single penalty for multiple violations and the trial court has found some of the

violations to be unsupported by the evidence, and the trial court has a "real doubt" as to whether the Board would have taken the same action on proper findings, the matter should be returned to the Board for a redetermination of penalty. (Franz v. Board of Medical Quality Assurance, supra, 31 Cal.3d at p. 145.)

The Board contends that the trial court erred in refusing to uphold the penalty of revocation. The Board argues that, unlike the situation in Franz, it did not impose revocation based on all of the charges taken together, but instead imposed revocation six different times base don the six cases of treatment it believed mandated revocation. Because the trial court upheld the Board's findings with respect to one such patient (Rama H.), the Board argues that

revocation should have been upheld with respect to that patient.

We agree the trial court erred in finding that a "real doubt" existed as to whether the Board would have imposed the penalty of revocation based solely on the facts of the Rama H. case. The Board's decision clearly stated that "[e]ach order for revocation was evaluated on a separate basis that was independent of the other patient cases." This seems to be an attempt by the Board to avoid the Franz result by clarifying the penalty to be imposed for each separate offense, so that in the event some charges are not upheld, the penalties for the other remain.

However, we stop short of affirming the penalty of revocation in this

instance.[20] It would be difficult to find that the penalty of renovation is not grossly excessive when imposed solely for the treatment of this one patient. The findings of the Board do not indicate that Rama H.'s life was in any danger based on the failure of Dr. Hufnagel to

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[20] We assume, without deciding, substantial evidence supports the trial court's determination that the findings with respect to Rama H. are supported by the weight of the evidence. The Board found that Dr. Hufnagel's treatment of Rama H. was grossly negligent, in that she convinced Rama H. to cancel a necessary hysterectomy and consent instead to Dr. Hufnagel's treatment by myomectomy (tumor removal). Even after the operation, when the facts clearly indicated the necessity for a hysterectomy, Dr. Hufnagel failed to recommend one to Rama H. Additionally, Dr. Hufnagel was found to have been dishonest in her billings submitted for Rama H., billing for several procedures which had not been performed.

recommend of perform a hysterectomy. Although we do not condone a physician's failure to fully inform a patient about necessary treatment and treatment alternatives, a failure to so inform one patient may not be sufficient to justify the revocation of the license of an otherwise competent surgeon. Thus, the penalty of revocation might be excessive if imposed solely on the basis of treatment rendered to Rama H. However, the trial court also upheld numerous dishonest billing charges. The trial court indicated that had the Board based its penalty of revocation on these charges, it would likely have been upheld. However, the Board did not impose a joint penalty for the grossly negligent treatment of Rama H. and the repeated acts of dishonesty. The penalty

of revocation might be appropriate under the totality of these circumstances. (Bus. & Prof. Code, § 2306 [authority hearing petition for reinstatement "may consider . . . the offense for which the petitioner was disciplined . . . ."].) Accordingly, it is in the interest of justice that the penalty imposed on Dr. Hufnagel be based upon all violations that are found to be properly supported. The trial court has already upheld several other charges against Dr. Hufnagel, involving dishonesty in her billing practices. Additionally, on remand, the trial court may find that some of the other charges of gross negligence and incompetence are also properly supported by the evidence. Based on these findings, the trial court may determine the penalty originally

imposed by the Board was proper.

## DISPOSITION

We reverse the judgment of the trial court granting the writ of mandamus in part. We remand for the trial court to exercise its independent judgment as to whether the Board's findings numbered IV, VII, XIII, and XLVII are supported by the weight of the evidence and to redetermine whether the Board's decision is supported by the totality of the findings found to be appropriately supported. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED

GRIGNON, Acting P.J.

DEPT. 86

**SUPERIOR COURT OF CALIFORNIA**
**COUNTY OF LOS ANGELES**

**Date: June 26, 1990** **T. Acuna, Deputy Clerk**
**Honorable David P. Yaffe, Judge** **R. Diggs, (E.R.M.)**

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C 730 624

V. Georges Hufnagel, M.D. — Counsel for Plaintiff
vs.
State of California — Counsel for Defendant

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**NATURE OF PROCEEDINGS:**

NUNC PRO TUNC ORDER

It appearing to the court that through inadvertence and clerical error, the minute order of May 18, 1990, for Department 86, in the above-entitled action does not properly reflect the court's order, said minute order is ordered corrected nunc pro tunc as of May 18, 1990, as follows:

| | |
|---|---|
| by striking on page 3: | unconditionally |
| by adding in place thereof: | unconditional |
| by striking on page 4: | XXI |
| by adding in place thereof: | XXXI |

by striking on page 5: XXI
by adding in place
thereof: XXXI

by striking on page 5: applicatino
by adding in place
thereof: application

A true copy of this minute order is mailed via U.S. Mail this date to counsel of record as follows:

| | |
|---|---|
| Frank Frisenda, Jr. | Antonio J. Marino |
| 11755 Wilshire Blvd. | 3580 Wilshire Blvd. |
| Tenth Floor | Suite 800 |
| Los Angeles, CA | Los Angeles, CA |

Frank Frisenda, Jr. (State Bar No. 85580)
Mike Taraska (State Bar No. 138090)
FRISENDA, QUINTON & NICHOLSON
11755 Wilshire Blvd., 10th Floor
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Telephone: (213) 478-4540

Attorneys for Petitioner
V. Georges Hufnagel, M.D.

FILED
JUN 26, 1990
T. Acuña

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

| | |
|---|---|
| V. GEORGES HUFNAGEL, M.D., | CASE NO. C 730 624 |
| Petitioner, vs. | PREEMPTORY WRIT OF MANDATE |
| STATE OF CALIFORNIA STATE AND CONSUMER SERVICES AGENCY, DIVISION OF MEDICAL QUALITY - BOARD OF MEDICAL QUALITY ASSURANCE, DEPT. OF CONSUMER AFFAIRS | DEPT.: 86<br>DATE: MAY 18, 1990<br>The Honorable David P. Yaffe, Superior Court Judge, Presiding |
| STATE OF CALIFORNIA STATE AND CONSUMER SERVICES AGENCY, DIVISION OF MEDICAL QUALITY-BOARD OF MEDICAL QUALITY ASSURANCE, DEPARTMENT OF CONSUMER AFFAIRS, | |
| Real Parties-In-Interest | |

TO RESPONDENTS BOARD OF MEDICAL QUALITY ASSURANCE:

Judgment has been entered in this action granting in part, Petitioner V. Georges Hufnagel, M.D. a Petitioner for Writ of Mandate.

Accordingly, you are hereby commanded immediately upon receipt of this Writ to set aside your decision in case No. D-3613 in the proceedings entitled, ""In the Matter of the Accusation Against V. Georges Hufnagel, M.D." and to:

1. - Modify your decision of August 14, 1989, by deleting therefrom Findings IV, VII, XIII, XXXI, XLVII, and the last paragraph L, and by deleting your order for the unconditional revocation of Petitioner's license and substituting therefore an order that such revocation be stayed on condition that Petitioner

comply with the terms and conditions of probation set forth elsewhere in said decision, for a period of five (5) years; or

2. - In the alternative, modify your decision of August 14, 1989, by replacing Findings IV, VI, XIII, XXXI, XLVII and the last paragraph of L, with findings that set forth the reasons for your disagreement with the findings of Administrative Law Judge and the evidentiary basis for such disagreement. If the evidentiary basis for such disagreement includes reliance upon the expertise of members of respondent Board, you are further ordered to give

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Petitioner notice of your intention to rely upon such expertise and an opportunity for rebuttal.

JUNE 26, 1990

FRANK S. ZOLIN
CLERK

(COURT STAMP)

By /s/
DEPUTY CLERK

~~LET THE FOREGOING WRIT ISSUE~~

~~DATED:~~

DAVID P. YAFFE
JUDGE OF THE SUPERIOR COURT

**PROOF OF SERVICE**

State of California-County of Los Angeles

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 11755 Wilshire Blvd., 10th Floor, Los Angeles, California, 90025

On June 9, 1990, I served the foregoing document described as PREEMPTORY WRIT OF MANDATE on X by placing __ the original X a true copy thereof enclosed in sealed enveloped addressed as follows:

Office of the Attorney General
3580 Wilshire Blvd.
Los Angeles, CA 90010
Attention: Tony Merino

X BY MAIL

X I caused such envelope to be deposited in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with firm's practice of collection and processing correspondence for mailing. It is deposited with U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage

meter date is more than 1 day after date of deposit for mailing in affidavit. Executed on June 8, 1990, at Los Angeles, California

X State I declare under penalty of perjury under the laws of the State of California that the above is true and correct. I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Donna Misenhimer
Type or Print Name

Donna Misenhimer
Signature

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES
DEPT. NO. 86 HON. DAVID YAFFE, JUDGE

| | |
|---|---|
| V. GEORGES HUFNAGEL, M.D., Petitioner, vs. STATE OF CALIFORNIA, etc., et al., Respondents. | NO. C 730 624 |

TRANSCRIPT OF PROCEEDINGS
May 18, 1990

APPEARANCES:

For Petitioner-Moving Party: FRISENDA, MORRIS & NICHOLSON
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For Respondent-Opposing Party: JOHN VAN DE KAMP, ATTORNEY GENERAL
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COURTROOM MONITOR: ROXAN DIGGS
TRANSCRIPTION BY: FOX TRANSCRIPTIONS

LOS ANGELES, CALIFORNIA, FRIDAY, MAY 18, 1990 - DEPT. 86 - HON. DAVID YAFFE, JUDGE

THE COURT: Hufnagel against the State of California. Appearances please, counsel.

MR. FRISENDA: Good morning, your Honor. Frank Frisenda, Jr., and Mike Taraska, for the petitioner, V. Georges Hufnagel.

MR. MERINO: Antonio Merino, Deputy Attorney General, for the respondents and opposing party.

THE COURT: All rights. Before we proceed any further with this matter, I want to disclose to counsel that Dr. Laurice Lazarus is my wife's gynecologist. So far as I know or can remember, I have never set eyes on Dr. Lazarus, nor have I ever spoken to him.

I have reviewed his testimony. It seems to me to be -- he seems to have testified as a percipient rather than as an expert witness in this case.

MR. MERINO: That is correct.

THE COURT: And I do not recall any instance in which his percipient witness testimony was challenged by any party in the briefs. On the basis of all of those facts, I don't think that my wife's status as a patient of Dr. Lazarus' will in any way affect my ability to impartially and fairly decide this matter. If either party has an argument that it wishes to make different from that, I'll hear it now.

MR. FRISENDA: Your Honor, in view of your comment I would like to be able to consult with my client, Dr. Hufnagel, from a standpoint of which effect your

disclosure has in terms of his testifying in this action. And I understand that Dr. Lazarus was in fact a doctor, treating doctor, of one of the patients in issue who did testify during the course of the proceeding.

I don't want to make a snap judgment one way or another with regard to what effect that has on further proceedings in this matter, but I would like to have a brief recess of perhaps three to five minutes just to consult with my client.

THE COURT: All right. I'll grant that request.

Also, among the preliminary matters to get out of the way here, I also want to state for the record that the court has read and considered the case of Vollstedt against the City of

Stockton, a case decided by the 3rd District Court of Appeal on May 14, 1990, which is published at 90 Daily Journal Appellate Reports page 52-54.

The case involves the question of whether due process is violated when the person who decides -- who ultimately decides the question at the administrative level -- does not actually hear the matter or refuses to review the transcript or -- which I think was -- or in this case some tapes of a hearing that was held. Since the case only recently came down, I want to make it clear from the record that the court has read and reviewed that case.

All right. We'll take a 5-minute recess at this time to allow counsel for petitioner to consult with his client.

MR. FRISENDA: All right, Thank you.

(Recess.)

THE COURT: All right. We're back in session on Hufnagel against the State.

The record will show that counsel are present and at the counsel table.

Mr. Frisenda, do you wish to be heard?

MR. FRISENDA: Yes, your Honor.

Your Honor, after consulting with the petitioner, Dr. Hufnagel, it's my understanding that Dr. Lazarus was a treating physician on at least the following cases: Karen G.; Deborah S.; Rama H.; Marcia C. and was possibly involved in the treatment rendered to Jan Ledieux, Jan L. Moreover, Dr. Lazarus has transmitted videos and correspondence

to plaintiff's attorneys in the five pending malpractice cases which form the basis for our prior motion requesting a continuance of the stay ordered by Judge Vogel and formed the basis, in part, of our motion for a preliminary injunction which the court has denied this morning.

Moreover, the record shows at the administrative level that it was Dr. Lazarus who filed the complaints, at least some of the complaints, in the BMQA action against Dr. Hufnagel.

Dr. Lazarus indeed signed a declaration against petitioner and that declaration was submitted in respondent's opposition to stay which was head by Judge Vogel in October of 1989.

Indeed, there is further pending a case brought by Dr. Hufnagel against Dr. Lazarus and Cedars Sinai

Medical Center. In view of those factors, among others, because we haven't had a chance to fully consider the entire effect, we would like to exercise petitioner's right under 170.1 and the further sections to have this matter briefed from a standpoint of whether or not your Honor can proceed with this case.

THE COURT: All right. Mr. Merino.

MR. MERINO: Yes.

Very briefly. Dr. Lazarus only testified as a percipient witness. There is absolutely no record that he ever filed a complaint with the Medical Board against Dr. Hufnagel. In fact, Dr. Lazarus was not permitted to render any type of opinion as part of the administrative record before you. Petitioner has even previously argued

that Dr. Lazarus' testimony supports their defense. Dr. Lazarus was not involved in any records or treatment of Jan L.

We submit that there is no evidence or indication in this case that the connection, as stated by your Honor, with Dr. Lazarus would be of the type that would warrant any kind of relief or removal.

(Pause.)

THE COURT: Well, apparently the statutory procedure in this case requires the question of disqualification to be heard and determined by another judge.

(Pause.)

"If" --

(Pause)

-- "a party files with the clerk a written verified statement

objecting to the hearing or trial and setting forth the facts constituting the grounds for disqualification at the earliest practicable opportunity after discovery of the facts constituting the ground"

Since counsel for petitioner has only now discovered the ground which he asserts for disqualification, it would seem to me that he should have an opportunity to present that written verified statement and the question of disqualification should be heard and determined.

The only question is, what do we do in the meantime?

Mr. Merino?

MR. MERINO: Well, this case has experienced many delays. I would urge the court to proceed at this point if

counsel wishes to bring any such motion. I think the relationship in this case is remote and tenuous at best. It is one of many percipient doctors who testified or had involvement in this case. Los Angeles is a large city, but there is a limited group of gynecologists. We submit that -- that statements by the court so far would not indicate any conflict. And in view of the many delays previous up to this case, this case should be determined as expeditiously as possible.

THE COURT: Mr. Frisenda.

MR. FRISENDA: Your Honor, it is a fundamental right of petition to receive due process, procedural due process as well as substantive due process, not only at the administrative level, but in review of those proceedings by the L.A.

Superior Court.

The delays in these -- in this matter is not the cause or sole cause of petitioner. Indeed, we're prepared to go forward this morning. We have our exhibits. We have our demonstrative evidence to be presented to the court. And when you first made us aware of your wife's treatment by Dr. Lazarus, it's a bonafide concern to petitioner, to myself and to her co-counsel who is handling the co-pending malpractice cases.

Obviously, the matter is important. The matter is important to petitioner as well. She suffers from a cloud over her head caused by, first, the accusation filed by respondent; secondly, a proposed decision rendered by the administrative law judge.

THE COURT: Well, Mr. Frisenda,

let's stick to what's -- what I think we've narrowed the issue down to here. I have already agreed with you that this challenge, if you present it in writing seasonably, is one that should be determined by another judge. You have, therefore, preserved whatever rights you have in the making of the challenge.

The only question is, what do we do in the meantime? Now there are two choices: We either recess this proceeding and defer it until after the question of the challenge is decided or since the parties are here ready to proceed, the court is here ready to proceed and has prepared for the proceeding by reviewing the evidence presented, whether we should proceed with the hearing.

This really is a question that

involves what is best as far as preserving judicial resources and not wasting the court's time. Obviously, if we're going to hold -- if we were to hold -- going to hold a lengthy hearing here, and it might all go for naught because I'm not qualified to hear it, it would be a reasonable allocation of judicial resources to defer the matter and decide the challenge first and let the court go on and do other business.

However, there is a matter that, at least as far as it looks now, is going to be concluded in a relatively short period of time. The parties and the court are hers ready to proceed. So the question is whether we should just do that subject to your -- the right to exercise your challenge.

MR. FRISENDA: Your Honor, we

have just been made aware of the grounds as you announced some 20- minutes ago. It's important that we have the opportunity to present that verified written statement as required by the code and to document it. And we do wish to preserve petitioner's right to have that matter heard by a neutral or independent judge.

For those reasons, we would request a five-day period in which to file the written statement giving grounds for the challenge and then to have the matter set before an independent judge for consideration of those grounds. I don't think that we're dealing with a slight matter in terms of safeguard of procedural due process of petitioner's right, which is a vested right to practice medicine.

THE COURT: Well, all right. I think that considering that the parties and counsel are here ready to proceed, the court has prepared to hear the matter today and has set aside its entire calendar to do so and with the -- with every indication that the matter can be concluded today, I think the best thing to do, as far as conserving judicial resources, yet preserving to petitioner his right to exercise the challenge, is to go ahead and proceed subject to the challenge. Petitioner will be given an opportunity to present a written challenge.

However, I don't think five days is necessary. I think it should be presented by tomorrow at the latest. And the procedure to have another judge determine the propriety of the challenge

will then be -- will then ensue from there. But in the meantime, we will go forward with this proceeding.

MR. MERINO: Your Honor, would that be Monday? Tomorrow would be Saturday.

THE COURT: Monday.

MR. MERINO: Okay.

MR. FRISENDA: Your Honor, I'm sorry. In view of the court's decision to go forward in the face of the challenge, we vigorously dispute the court's right to go forward. And I believe that that is contained in 170.3.

We must have that opportunity to file the written statement. And in view of your refusal then under 170.3, paragraph C(1), if the court chooses to go forward, we would like to seek the appropriate review of your Honor's decision.

THE COURT: I don't follow your reasoning, counsel. What is the argument you're making?

MR. FRISENDA: The argument, your Honor, is that number one, petitioner has an opportunity to present to an independent reviewer a written verified statement of the grounds for challenge after she first discovered them.

Number two, it is mandatory that that challenge then be heard by an independent judge and not your Honor. From that standpoint, a request of five days to have that matter heard, I think, is essential to preserving her rights. If we are to go forward today, we would essentially be accomplishing a futile act and a futile act which would disclose our theories and procedures with regard to why the administrative decision is

incorrect and should be overturned.

THE COURT: Well, I would presume that you have disclosed your theories and procedures by now in your -- in the papers that you have filed both with this court and at the administrative hearing and with all of the exhibits and other material that you have asked the court to consider.

MR. FRISENDA: Your Honor, obviously there is disclosure of the theories and there is disclosure of the reasons why we think that the decision is defective. I thought that your Honor had the entire day to consider this matter and that it was not going to be a brief hearing from that respect. I can only state at this point that we wish to preserve petitioner's right to present a verified written statement in compliance with the

code and then to have that matter heard by an independent judge before this court acts. And that is a fundamental right; it's not one that -- it's one that has been codified.

And indeed the time and resources in presenting this matter to the court that may have the inability to act because of the challenge, I don't think, is accomplishing any economy from the standpoint of the court or the respective parties. But this is not a matter that we believe is discretionary. It's a mandatory requirement in view of your Honor's disclosure this morning.

THE COURT: What is a mandatory requirement?

MR. FRISENDA: The mandatory requirement that the petitioner be afforded the opportunity to present --

THE COURT: I've already said you're going to have that opportunity, counsel.

MR. FRISENDA: But you're saying, your Honor, that the purpose of that disclosure is to have that independent judge take a look at the grounds for the challenge. And I believe that if you're simply stating that it -- they're words in a statute, but without giving them the true meaning and effect, that you are --

THE COURT: The only thing that I can find in the statute that bears upon this subject at all is Section 170.4C(1), which says"

"If a statement of disqualification is filed after a trial or hearing has commended by the state of voir dire, by the swearing of the first witness, or by the submission of a motion for decision, the judge whose impartially

has been questioned may order the trial or hearing to continue, notwithstanding the filing of the statement of disqualification.

"The issue of disqualification shall be referred to another judge for a decision as provided in subdivision A of Section 170.3. And if it is determined that the judge is disqualified, all orders and rulings of the judge found to be disqualified made after the filing of the statement shall be vacated."

Now the question is, has this hearing commenced?

MR. FRISENDA: Your Honor, if I --

THE COURT: We -- there is going to be no voir dire.

There, as far as the court knows at this time, are not going to be any witnesses sworn. And there has been

the submission of a motion for decision, it seems to me, in this matter.

MR. FRISENDA: Your Honor -- your Honor, from the standpoint of when a trial commences, it's clear that it commences when an opening argument is made in this particular matter. That matter has been previously briefed to Judge Janavs in terms of the peremptory challenge which was filed with her. There is no question that the trial and the hearing in this matter has not commenced. And I believe that for those reasons that 170.4 are inapplicable. And I believe that the appropriate sections are contained in the preceding section.

That is, number one, she must have that opportunity, as soon as practical, to file that verified written statement and then to have the matter

heard by an independent judge.

THE COURT: Well, 170.3 is, of course, completely silent as to whether a proceeding may continue while the challenge is being determined. That seems to be governed, to the extent that it is by statute, by 170.4C.

MR. FRISENDA: Your Honor, 170.4C expressly adopts that procedure after the trial has commenced. And from the standpoint of referring to the prior authorities, I would be happy to review those with the court as to why the trial has not commenced in this action and why petitioner is entitled and will exercise her right to her oral argument in this matter.

THE COURT: Well, a mandate proceeding is heard on the record adduced at the administrative level unless

additional evidence is admitted pursuant to the provisions of Section 1094.5E of the Code of Civil Procedure.

There has been no such evidence, no such additional evidence, to my knowledge offered in this matter. All of the evidence adduced at the preliminary hearing, or at the administrative level, has been previously lodged with the court and had been reviewed by the court in preparation for today's hearing.

MR. FRISENDA: Your Honor, again that -- this is not a matter that we need to speculate on; that the case law is clear as to when a trial commences at the administrative --

THE COURT: Well, all right. What's the case law then?

MR. FRISENDA: Okay, If -- if you

will give me just one second I will reference that portion of the brief.

MR. MERINO: Your Honor, if I may address the court on that issue.

Part of the opposition that we filed with Judge Janavs on the challenge set forth what the case law is. There's the case of Bevli v. Drisco. And it's cited in that brief. Unfortunately, I don't have it handy. But in our opposition under 170 point --

THE COURT: What's the name of the case?

MR. MERINO: Bevli v. Drisco, which discussed, for purposes --

THE COURT: Okay.

MR. MERINO: -- v. Drisco. And it's in our opposition papers. I can take a moment and try to look it up.

That case dealt with the

requirements of a statement for the decision and when a trial commenced. And the holding in that case is that in a mandate proceeding the trial may be judged to have commenced when the review of the exhibits begins by the court. By analogy we have cited that case in front of Judge Janavs.

In fact, Judge Janavs in granting the motion made a comment that she was not convinced that the trial had not already commenced at that point, but she was transferring the case anyway.

Mr. FRISENDA: Your Honor, it is true that this matter has been previously been briefed to Judge Janavs. And Judge Janavs agreed with the petitioner as to the comments in Bambulah v. Superior Court. And the cite on that is 174 Cal.App.3d 653. And why that

holding -- those holdings cited by respondent were limited to the interpretation under the Code 632.

In this instance, 170.6 of the Code of Civil Procedure provides in pertinent part that in no event shall any judge, court, commissioner or referee entertain the motion if: Item (1) it be made after the drawing of the names of the first juror; or if there be no jury, (2) after the making of an opening statement by counsel for plaintiff.

THE COURT: All right, But that's for the purpose of a peremptory challenge under 170.6, counsel.

MR. FRISENDA: But --

THE COURT: We're talking here about a challenge under 170 -- under the procedure in 170.1.

MR. FRISENDA: But your Honor, if --

if I might go on further. Even Witkin at Cal. Procedure 3rd Edition, Volume 7, Section 3, Trial page 18 and 19 is clear.

THE COURT: Page -- Volume 7 --

MR. FRISENDA: Section 3, Trial, pages 18 and 19. And that's the 1985 edition.

It say's, "A trial is deemed to commence at the beginning of plaintiff's opening statement or, if there is none, at the time of swearing the first witness or introducing any evidence." In this instance there is no question that there is an opening statement and that there is argument on the part of petitioner in this mandate proceeding.

And these items -- I'm sorry -- this case law has been reviewed. And we would argue that the law of the case, with regard to the commencement of the

trial in this matter, is clear. And it's clear on the basis of Judge Janavs' ruling to take herself off the case after the peremptory challenge was made.

We cited the distinctions in Bevli v. Drisco. That's the case which is relied on by the --

THE COURT: What's the citation of that case?

MR. FRISENDA: Okay. Bevli is 165 Cal.App.3d 812, and at page 821 and 822. So we stated at page 8 of the petitioner's reply to respondent's opposition, which was filed on April 26, 1990, that Bevli is clearly inapposite to the statutory mandate of CCP Section 170.6.

That is to say that it is irrelevant to the provisions of that section, that time expended by the trial

court in absorbing evidentiary information for trial has to be considered for purposes of the finding under Code of Civil Procedure Section 632.

There is really very little doubt in this matter that petitioner has an absolute right to present that verified written statement and to present it to an independent judge for reconsideration.

THE COURT: Well, as I've said now three times, there's no disagreement as to that. We've narrowed this down to the issue of whether or not this hearing has begun. If this hearing has begun, then the court obviously has discretion to continue with it and allow the challenge to be determined in due course. So the issue is, has this hearing begun or

hasn't it?

I'm going to take a recess now and I'm going to look at the authorities that you each have cited to me. And we'll then reconvene and decide where to go from here.

Court is in recess.

MR. MERINO: Thank you, your Honor.

MR. FRISENDA: Okay. Thank you, your Honor.

(Recess.)

THE COURT: This is Hufnagel against the State.

The record will show that counsel are present and at the counsel table.

The court has considered the authorities cited to it by counsel for the party, for the various parties here. And it seems to me that the case of Bevli

against Drisco, 165 Cal.App.3d at 812 is the most helpful in resolving that issue. There the court of appeal held that a trial in a mandate action of this type is deemed to have commenced when the court reviews the administrative record for the purpose of determining whether the trial is of a duration of more than one day, which in turn governs whether the party is entitled to a written statement of decision.

This court has spent the better part of two full days reviewing the record in this case. And it would seem to me that the same rationale would apply to the commencement of the trial under Section 170.4. Since that amount of judicial time has been invested in this proceeding, it would seem to me that the proceeding should be held to have

commenced for the purposes of CCP Section 170.4 so that the court has the discretion to continue with it, notwithstanding the filing of a statement of disqualification.

The statement of disqualification, of course, as the court has indicated, may still be filed and this proceeding will continue on the -- subject to the condition that if the disqualification is upheld then anything that happens hereafter will be of no force and effect.

But subject to that condition, it is the order of the court that this hearing will continue.

MR. FRISENDA: Your Honor, may I be heard?

THE COURT: Not on that issue. We have, I think, exhausted that issue and

we're going to go on to something else.

MR. FRISENDA: All right, Your Honor, in view of the court's ruling, we would like to seek a writ of prohibition from the California Appellate Court in accordance with Zaldnick v. Superior Court, 38 Cal.App.3d 849.

The language of the Code, again at 170.3, subsection 3 and 5, is clear. And for those reasons, we would request a temporary stay by the trial court of two hours to present this matter to the Court of Appeals on a writ of prohibition. And we again state from a standpoint of considering the issue of commencement of the trial, this was previously ruled on by Judge Janavs, that that is the law of this case.

Although your Honor appears to read Bevli in favor of respondent, the

authorities are presented on behalf of petitioner previously to the court and that court agreed with respondent -- I'm sorry -- agreed with petitioner with regard to when a trial commences in this action.

In view of those circumstances and in view of the fact that petitioner is not even afforded an opportunity to file a written statement in a court with 170.1, we request the stay of two hours.

THE COURT: I think I've made it clear that petitioner is entitled to file a written statement by tomorrow.

The request for stay is denied.

All right. We have two matters before this court today: one is, of course, the trial of the mandate proceeding; and the other is a motion

filed on May 3rd for a preliminary injunction to enjoin the respondent from proceeding with this matter.

The court has issued a tentative ruling to deny that motion. It seems the motion appears identical to relief denied by Judge Janavs on March 30th, 1990.

Mr. Frisenda, do you wish to be heard with respect to that motion?

MR. FRISENDA: Yes, your Honor.

From a standpoint of subsequent proceedings, I would like to advise this court that petitioner has filed a notice of appeal on the basis of Judge Janavs' denial of the stay of March 30, 1990. And for a standpoint of further proceedings concerning the preliminary injunction, since the injunction that is sought would be mandatory in character, which means that she currently has a

vested right to practice her chosen profession in the medical community, the denial of the stay and indeed a denial of the preliminary injunction are matters that are not within the jurisdiction of the California Appellate Court. I would like to present to this court a conformed copy of the notice of appeal which was filed with the court yesterday, so at least that that is part of the record before the court today.

THE COURT: This is a notice of appeal from what?

MR. FRISENDA: This is a notice of appeal from the denial of petitioner's application for stay by Judge Janavs on May 3rd -- I'm sorry -- March 30th, 1990.

THE COURT: Since when is the denial of a motion for stay an appealable order?

MR. FRISENDA: Your Honor, the case

law supports that. Indeed, the case law supports it when this court believes, at least in its tentative ruling, and respondent has asserted, that the preliminary injunction is identical to the relief which was requested by Judge Janavs on March 30th. And for those reasons --

THE COURT: You've lost me. I don't follow that logic at all.

MR. FRISENDA: Okay.

THE COURT: Because you're now making a motion identical to a motion that you previously made and lost before another judge, that shows that somehow the order of the other judge denying the motion is appealable?

MR. FRISENDA: No, your Honor.

THE COURT: I'm lost.

MR. FRISENDA: The denial of a

preliminary injunction is appealable. And the denial of the stay under these circumstances is also appealable. And when those matters are in the jurisdiction of the appellate court, then this court is not with authority from a standpoint of addressing those issues as to matters that are embraced within the jurisdiction of the Court of Appeals.

THE COURT: It's my understanding, counsel, that an order denying a preliminary injunction is not appealable.

MR. FRISENDA: Your Honor, I believe you're incorrect in that respect. And for those reasons, again, I would simply like to present, as part of a complete record, a copy of the notice of appeal which was filed with the court yesterday.

THE COURT: You may present it to the clerk.

MR. FRISENDA: All right.

THE COURT: If your contention is correct, however, then whenever a party moves for a stay and the stay is denied, the party may file a notice of appeal and then obtain the stay that he was denied.

MR. MERINO: For the record, your Honor, I haven't received notice of this notice of appeal. I don't have a copy.

MR. FRISENDA: I'm sorry.

(Pause.)

THE COURT: And I am sure that that cannot be and is not the law.

Furthermore, the point concerning the application being made here today being the same application that was made to Judge Janavs, only means that this case -- that this court should not and will not consider the application on its merits.

The application has been made to another judge. If it is to be reconsidered or vacated, the local rule of this court require that such an application be made to the judge who made the original order.

And it is also not the law that counsel can make an application to one judge of this court, get a ruling adverse to his interest, peremptorily disqualify that judge, and then make the precise same application to another judge in the hope of getting a more favorable ruling.

MR. FRISENDA: Your Honor, that's clearly not the case at hand here. And I regard those comments by the court as not accurate and inappropriate for the reasons that were addressed previously to the court.

The motion for a preliminary

injunction is brought on the statutory grounds of multiplicity of litigation. Those grounds were not presented to Judge Janavs. And indeed -- your Honor?

THE COURT: Wasn't the application for a stay presented to Judge Janavs on the ground that this action should be stayed until these other malpractice actions against the petitioner are resolved?

MR. FRISENDA: Your Honor, there certainly are co-pending malpractice cases. And what was presented --

THE COURT: Wasn't that the ground for the motion to stay?

MR. FRISENDA: The grounds for the motion to stay were in part presented to the court based on the fact that the -- the departments that were handling those malpractice actions had jurisdiction

based on first filed and the -- and the fact that those cases are assigned to other departments of the Los Angeles Superior Court. It was not asserted on the basis of multiplicity of action, which I believe is CCP Section 526, subsection 6.

I really just want to preserve the petitioner's rights with regard to both the application for stay and the denial thereof, and the motion for preliminary injunction. I didn't really expect to argue much today on the merits of the preliminary injunction because we had a copy of the tentative ruling and saw the content of the tentative ruling. So I don't want to belabor that point, it was simply to preserve the grounds.

THE COURT: All right. Then the motion for preliminary injunction is

denied.

MR. FRISENDA: All right.

THE COURT: All right. With respect to the mandate matter.

(Pause.)

THE COURT: There has been furnished to the court, lodged with the court, a sizable number of documents consisting first of a transcript of an administrative proceeding in 28 volumes.

Who -- which party lodged the transcript?

MR. FRISENDA: Your Honor, petitioner lodged the transcript with the court.

THE COURT: Is there any objection to the transcript, volumes 1 to 28, being received in evidence.

MR. MERINO: No objection.

THE COURT: All right. The

transcript then is received in evidence. Petitioner is ordered to pickup the transcript at the conclusion of this hearing from the clerk.

All right. There are also two cardboard cartons full of documents. They are gathered together in groups, and the groups are labeled as exhibits 1 through 84.

Now who lodged those exhibits?

MR. MERINO: Respondent did, your Honor.

THE COURT: All right. Is there any objection to exhibits 1 to 84 being received in evidence?

MR. FRISENDA: Your Honor, I have not had an opportunity to review what's contained in the box. There are certainly objections to the entirety of the exhibits from a standpoint of, if

those are the same exhibits considered by the administrative board. Particularly a number of those exhibits have simply been marked for identification and never admitted into evidence. And for those reasons we do wish to preserve the objection to the various exhibits.

THE COURT: Well, what are these exhibits 1 to 84, Mr. Merino, with respect to the administrative proceeding? Were they exhibits that were introduced in evidence in the administrative proceeding?

MR. MERINO: The exhibits, not only the 1 through 84, but also petitioner's exhibits, which are A through V, were the ones that were offered, admitted or marked for identification at the administrative hearing. We filed a notice of lodging administrative exhibits back in

February, which designated the exhibits and designated which ones were only for identification. I can run quickly through those that only for identification at this time if that's what the court wishes.

THE COURT: All right. Why don't you do that for the record.

MR. MERINO: Okay. The first -- exhibits 1 through 53 are in evidence -- or were in evidence -- at the administrative hearing. Exhibit 54, only pages 4, 5, and 13 were admitted. The remainder remained marked for identification only. Exhibit 55, only pages 4 to 5.

Exhibit 60 was the hypotheticals propounded by the complainant in that case and those were marked for identification only. Exhibits 83 and 84 were the arguments filed by the

complainant in that case, and they were marked for identification only.

I can go through petitioner's exhibits at the administrative level as well.

THE COURT: Well, all right. Let's just stick to exhibits 1 to 84 then.

Are you representing, Mr. Merino, that all of the exhibits other than certain pages of 54 and 55 and exhibits 60, 83 and 84 were introduced in evidence at the administrative hearing?

MR. MERINO: That is correct.

THE COURT: All right. As to those exhibits that were introduced in evidence at the administrative hearing, Mr. Frisenda, is there any objection to those?

MR. FRISENDA: Your Honor, again, I have not viewed the copies of what Mr.

Merino had lodged with the court. He did not supply me with copies of those. I think for the most part we would agree that evidence that was admitted by the administrative law judge should be considered by this court.

THE COURT: All right. Then with the understanding that exhibits 1 to 53; exhibit 54, pages 4, 5, and 13; exhibit 55, pages 4 and 5; and the remainder of the exhibits through 84, except exhibits 60, 83 and 84, with the understanding that they are received in evidence at the administrative hearing, they are -- and based upon that representation -- they are admitted in evidence here.

All right. There are other than -- there are then other exhibits labelled A to V, which were lodged by the petitioner; is that correct?

MR. MERINO: No. Those were lodged by the respondents as well.

THE COURT: They were lodged by the respondent?

All right. How do they differ from exhibits 1 to 84 then? They were introduced by the petitioner at the administrative level?

MR. MERINO: That is correct.

THE COURT: All right. Is there any objection to exhibits A to V being introduced into evidence?

MR. MERINO: Again, your Honor, there is the notation that some are for I.D. only at the administrative level.

THE COURT: All right. Which are those?

MR. MERINO: Okay. Exhibit H, which is a letter which was marked for identification only. Exhibit Q, which

are the hypothetical propounded by petitioner at the administrative hearing, I.D. only. Exhibit R, was submitted as administrative hearsay.

THE COURT: I'm sorry.

MR. MERINO: Exhibit R, as in Roger, was submitted as administrative hearsay. And I had that notation, but it was submitted.

THE COURT: What does that mean? Was it admitted as hearsay, as admissible hearsay at the administrative level?

MR. MERINO: Right. That is correct.

Exhibit S, as in Samuel, which was marked for identification only, And exhibit V, as in Victor, which was petitioner's argument at the hearing level.

THE COURT: All right. With respect

to the exhibits A to V, other than H, Q, S and V, Mr. Merino, the ones that were marked for identification only at the administrative level, does the State have any objection to them?

MR. MERINO: None.

THE COURT: All right. Those exhibits then will be admitted in evidence.

What about --

MR. FRISENDA: Your Honor -- your Honor, I didn't -- I believe you mis-spoke when you said Mr. Merino. He's the proponent of the exhibits and we didn't have an opportunity to comment on that.

THE COURT: Well, these were exhibits that you submitted at the administrative level. Do you wish to object to some of those now?

MR. FRISENDA: No. I just wanted to

-- to make the record clear that we had no objection to those that were admitted in the administrative proceeding.

THE COURT: All right. Fine. Thank you.

All right, Mr. Frisenda, do you wish to make any argument as to the admissibility here of exhibits H, Q, S and V.

MR. FRISENDA: Your Honor, we have no objection to the admissibility of those evidence marked for identification.

THE COURT: All right. But there has been a -- therefore is an objection to them, I take it, by respondent since they were marked for identification only at the administrative --

MR. MERINO: That is correct, your Honor.

THE COURT: Which means they were

rejected -- were they rejected by the administrative tribunal, or were they just never offered?

MR. MERINO: No. Well, with the exception of the hypotheticals, where by agreement they remained -- and the argument, which also remained for identification. H, there was an objection and the administrative law judge then declined to admit it, but left it marked for identification.

THE COURT: All right. And what about Q?

MR. MERINO: And that is -- Q was the hypotheticals, which were never actually offered then by petitioner below. S is a set of medical records by Dr. Parks of Jan L. Those were offered by the petitioner. There was an objection. And again, the administrative

law judge rejected their admission.

THE COURT: And V was argument.

MR. MERINO: V was argument.

THE COURT: All right. Then that narrows it down to exhibits H and S. Is there any argument that petitioner wishes to make as to their admissibility?

MR. FRISENDA: Your Honor, from the standpoint of all of these exhibits H through -- H, Q, R, S, V, we would move that they be admitted into evidence by this court. The administrative law judge is a quasi-judicial officer not versed in the rules of evidence. And for those reasons, we believe that all of the exhibits submitted by the petitioner at the administrative level should be received.

THE COURT: Well, I believe your burden with respect to exhibits H and S,

counsel, are to make a showing under 1094.5E of the Code of Civil Procedure, that this was evidence which was improperly excluded at the hearing.

(Pause.)

MR. FRISENDA: If I might have an opportunity to pull those exhibits, it is from the standpoint of either our files or the court files and comment on each one of them, I'd like to do that.

THE COURT: Well, all right. They will not be admitted at this time. If and when the showing -- a showing -- is made by petitioner under section 1094.5E, the court will reconsider their admissibility. But they are not admitted absent such a showing.

All right. The only thing that I know about is a loose-leaf notebook that contains various types of documents,

some of which are letters, some of which are memoranda, some are under oath, most are not.

Who lodged this notebook?

MR. FRISENDA: Your Honor, I believe that was lodged by petitioner. And I believe that the notebook has been previously considered in terms of the application for stay which was heard by Judge Vogel in October of last year.

THE COURT: All right. Is there any contention that it should be admitted in evidence here?

MR. FRISENDA: Only as part of the prior record. That is the prior record in this -- this proceeding.

THE COURT: You mean for the purpose of appeal on the question of the stay?

MR. FRISENDA: Well --

THE COURT: You want it part of the

record for that purpose?

MR. FRISENDA: Well, we would like to have it as part of the record on the writ proceeding, which means that Judge Vogel did grant the stay in October of 1989 and we want to make sure that that is part of this record.

THE COURT: All right. But you're not offering these documents in evidence

MR. FRISENDA: No.

THE COURT: All right. Then they will not be admitted.

MR. MERINO: For the record, your Honor, I noted counsel referred to Judge Vogel having considered and reviewed that exhibit. Judge Vogel specifically said she had not considered that notebook. And that statement's on the record. I have a transcript available of those proceedings. I just want to note that

for the record.

THE COURT: All right.

All right. Is there any other evidence now that either party contends should be admitted in evidence or considered by the court in this proceeding?

MR. MERINO: Your Honor, there are other exhibits that we have objected to that had been attached to various documents. It's part of our return. I have a listing of them.

THE COURT: These are documents that the State believes should be admitted in evidence that have not been --

MR. MERINO: Should be rejected.

THE COURT: -- admitted?

MR. MERINO: That should be rejected. They've been lodged or attached to various documents by

petitioner --

THE COURT: All right. Counsel. Counsel, the question that the court has addressed to counsel is, are there any other documents which either party contends should be admitted in evidence in this proceeding other than those that have heretofore been admitted?

MR. FRISENDA: Your Honor, we have prepared demonstrative exhibits, which I think will assist the court in understanding the record. And I believe that there are certain videotapes which were commented on, at least by prior judges in this matter, and I would like to know the -- the item numbers of those videotapes that were submitted to the court and whether or not this court has viewed those videotapes.

THE COURT: Are they -- are the

videotapes marked as exhibits? Are they part--

MR. MERINO: Yes. They've been admitted now. They were part of the exhibits offered both at the administrative level and this morning again.

THE COURT: All right. If they are part of exhibits 1 to 84, then they have been admitted to the extent that exhibits 1 to 84 are admitted into evidence.

MR. FRISENDA: Your Honor, from again a standpoint of not having an opportunity to see what videotapes were presented, I simply want to maintain or preserve those -- those objections to a time that we have an opportunity to at least review the titles on them.

THE COURT: Well, I don't know what objections you're talking about. The

videotapes apparently --

THE CLERK: (Discussion with the court, unintelligible.)

THE COURT: Yeah. What numbers are there?

THE CLERK: 70, 73, 74A, 74B.

THE COURT: All right. The videotapes, therefore, have been admitted in evidence.

MR. MERINO: Okay. There's more.

THE CLERK: There's some more. 7, 2 -- it says, I.D. -- 15, and 13.

MR. FRISENDA: Your Honor, from --

THE COURT: All right. Exhibits bearing those numbers have been admitted in evidence.

MR. FRISENDA: Your Honor, I don't believe that respondent's counsel mentioned that videotape number 2 was simply I.D.'d and not admitted into

evidence. From that stand- --

THE COURT: Exhibits 1 to 53 have been admitted in evidence.

MR. MERINO: Exhibit 2 was admitted at the administrative hearing.

MR. FRISENDA: But, your Honor, your clerk just indicated that it was marked for I.D. only.

THE CLERK. No. It just says I.D. I don't know what it means.

THE COURT: Mr. Frisenda, exhibit 2 has been admitted in evidence. Do you have an objection to it?

MR. FRISENDA: Yes, your Honor. If it was not in fact admitted in evidence at the administrative level we object to the admittance in this court.

If I might view it, at least the title of it, it might assist me in terms of whether it was marked for

identification only or --

THE COURT: All right. You may take a look at it.

MR. FRISENDA: Okay.

(Pause.)

MR. FRISENDA: It appears only to indicate that it's identified and not admitted. We would object then to that version.

THE COURT: Who submitted it; who offered it at the administrative hearing?

MR. MERINO: It was the complainant's case, your Honor. And I challenge counsel, because that exhibit was admitted. Counsel, at this stage, should be more familiar with the record. There had been objections to that exhibit, but the administrative law judge clearly admitted that exhibit. In fact, it was used by both sides and viewed and

reviewed in the record.

THE COURT: You're representing that it was in fact received in evidence in the administrative proceeding?

MR. MERINO: That is correct, your Honor.

THE COURT: All right. Then it will be received in evidence here.

All right. Is there any other -- you say you have some demonstrative exhibits, Mr. Frisenda, are those that you -- exhibits that you propose to use for purposes of argument?

MR. FRISENDA: Yes, your Honor.

THE COURT: All right.

MR. FRISENDA: They include a binder and then some blow-ups of various documents which were contained either in the pleadings, files or part of the record at the administrative proceeding.

THE COURT: Are they blow-ups of documents that are already in evidence?

MR. FRISENDA: In some instances they are not. From a standpoint of the hypothetical facts, which this court has not admitted into evidence and was not admitted at the administrative level, we have a blow-up of those hypothetical facts.

The binder contains seven tabbed items. The first tab really -- not that binder, your Honor. I have a new binder if the court wishes to at least review it.

THE COURT: Of documents that you propose the court should consider?

MR. FRISENDA: It's essentially, your Honor, a convenient way that the court and counsel can follow along with the presentation of petitioner's case.

It includes the accusation, the pre-trial conference order, the hypothetical facts which were used by respondent in the administrative proceeding, a copy of the proposed decision of the administrative law judge, a copy of the final decision, and then a listing submitted by petitioner which indicates material variance in the accusation. And --

THE COURT: All right, Let's not -- let's try not to confuse the evidentiary portion of this hearing with materials that you are going to use in argument.

What I want to know at this time is are there any documents or any evidence, other than what has already been admitted in evidence, that either party contends should be received in evidence?

MR. FRISENDA: Okay. Only to the

extent again that I refer to the blow-ups of -- of documents and items that were marked for identification.

THE COURT: Well, if you want the court to consider a blow-up of anything that isn't in evidence then you'd better identify that now and so that we can decide whether it's going to be received in evidence. If it isn't going to be received in evidence then I'm certainly not going to consider a blow-up of it, because if it's just a blow-up of a document that's not in evidence, it's not proper argument.

MR. FRISENDA: All right. We would not want it as part of the evidence at the administrative proceeding.

THE COURT: All right.

MR. FRISENDA: What we simply want to indicate is why the administrative law

judge was misled based on evidence that was marked for identification only and not admitted.

THE COURT: All right. Let's stick with evidence. Is there any other evidence you wish to offer, Mr. Frisenda?

MR. FRISENDA: We have nothing further in view of the prior rulings of Judge Janavs, which indicated that no live witnesses could be presented at this hearing.

THE COURT: All right. Is there any other evidence that the State wishes to present?

MR. MERINO: No, your Honor.

THE COURT: All right. The evidentiary portion of this hearing then is closed and the court is ready to hear argument of counsel.

(Pause.)

THE COURT: The court has prepared a tentative decision based upon the written arguments of counsel, and based upon the evidence that has been admitted in this proceeding. The clerk has made a copy of that tentative ruling for each counsel. It is somewhat lengthy. I'm going to take a 5-minute recess to allow counsel to read the tentative ruling. The tentative ruling is proffered to counsel for the purpose of enabling them to direct their closing argument to the points that are of interest to the court.

The court will be in recess until 10:30.

(Recess.)

THE COURT: All right. Mr. Frisenda, your opening argument, please.

MR. FRISENDA: Your Honor, I have reviewed the court's tentative decision

and I thank the court for the time that it spent in considering the procedural issues connected with petitioner's writ and also considering the evidence in this matter.

With regard to the opening arguments, I want to essentially direct the court to a binder that I've prepared, which I think will still assist the court in terms of walking through the various pleadings in the action and why -- why the court should pay particular attention to portions of those pleadings.

THE COURT: Very well.

MR. FRISENDA: Can I present that to the court?

THE COURT: Present it to the clerk.

MR. FRISENDA: All right.

THE COURT: Has counsel been furnished with a copy?

MR. MERINO: I --

MR. FRISENDA: I am doing that as well.

(Pause.)

MR. FRISENDA: Justice Tobriner in Bixby v. Perino, stated that once the agency has initially exercised its expertise and determined that an individual fulfills the requirement to practice her profession, the agency's subsequent revocation of that license calls for independent judgment review of the facts underlying any such administrative decision. Although we recognize that the California rule yields no fixed formula and guarantees no predictably exact ruling in each case, it performs a precious function in the protection of the rights of the individual.

And too often the independent thinker or crusader is subject to retaliation of the professional or trade group. The pressure toward conformity will often destroy the advocate of reform. The unpopular protestant may well provoke and arouse zeal of scrutiny by the licensing body that finds trivial grounds for license revocation.

In this instance, Dr. hufnagel shared in 1985 and years prior to 1985, an unpopular view; an unpopular view in terms of preservation of female reproductive organs. The simpler, the cheaper, the more invasive approach was the mainstream. Akin to the preservation of the Sistine Chapel, it's a tedious effort and it's simpler to whitewash the ceiling.

Because she was outspoken --

outspoken in the literary community, outspoken in the media, in print, on T.V. and radio -- the mainstream of the medical community in 1985 started a witch-hunt. A witch-hunt based on a shotgun approach, a shotgun approach of some 13 patients, which are contained in the administrative accusations.

The standards for review at both the administrative level and at the L.A. Superior Court and appellate courts thereafter are contained in case law which was agreed among the parties, at least in part. The first tab in the binder contains the decision of Ettinger v. Board of Medical Quality Assurance. And that decision reported at 135 Cal.App.3d 853 stated that the proper standard of proof in an administrative hearing to revoke or suspend a doctor's

license is clear and convincing proof to a reasonable certainty and not merely the preponderance of evidence standard.

What we have in one of the demonstrative exhibits, which we'll also find at tab 3 of the binder, is the pre-hearing conference order. And the pre-hearing conference order stated that at paragraph 2, the case involves an accusation -- that's what it was, an accusation And, therefore, the burden of proof is on the complainant.

At page 2 of the pre-trial conference order at the top, paragraph, subparagraph A, the parties were bound in the statement whether or not the factual allegations in the accusation are true by clear and convincing evidence. That was the standard adopted by the parties and that was the standard, in fact, built

into the final decision, the standard of Ettinger v. Board of Medical Quality Assurance. At least the case name was mentioned in the final decision.

The judge -- that is the administrative law judge -- stated that he didn't understand what the standard was. The administrative law judge tried his best, being a quasi-judicial officer, in terms of understanding what the court said in Ettinger v. Board of Medical Quality Assurance.

In particular, the transcript of volume 2, reveals at page 8 -- and I'll start at the lower portion of page 7, which says that Mr. Gans, who was the counsel for petitioner in the administrative proceeding, states at line 27, "I believe it should read whether or not the factual allegations in the

accusation are true and convincing proof to a reasonable certainty." And the administrative law judge tried his best, being a quasi-judicial officer, in terms of understanding what the court said in Ettinger v. Board of Medical Quality Assurance.

In particular, the transcript of volume 2, reveals at page 8 -- and I'll start at the lower portion of page 7, which says that Mr. Gans, who was the counsel for petitioner in the administrative proceeding, states at line 27, "I believe it should read whether or not the factual allegations in the accusation are true and convincing proof to a reasonable certainty." And the administrative law judge responded by saying, "Well, the agreement was that we would follow Ettinger in whatever

Ettinger says. I'm not sure what a 'reasonable certainty' is, counsel."

That's the standard which was supposed to be adopted by the administrative law judge when he considered the evidence which was presented to him, and presented to him during the course of some 28 days of testimony involving some 13 patients.

A shotgun approach, an approach of roulette. We'll accuse her with 13 patient records and will hope that something sticks.

The court in Topanga Association v. County of Los Angeles, which is the second decision contained in the binder, at 11 Cal.3d 506, wrestled with the problem of what is the standard of review of the L.A. Superior Court when they consider the propriety of the ruling

by an administrative law judge. And particularly at headnotes 4, 5 and 6 of that decision -- and I want to refer the court to page 514 of the Topanga decision -- it says that, "Section 1094.5 clearly contemplates that at a minimum the reviewing court must determine whether -- both whether substantial evidence supports the administrative findings, and whether the findings support the administrative or agency's decision."

The court in Topanga goes on to state that, "This court need not grope through some 28 volumes of transcript. And this court need not grope through pages and pages of exhibits which were presented to the administrative panel. What this court must do is examine the four corners of the decision and bridge an analytical gap," an analytical gap

between the findings and the conclusion of that decision.

The decision is supposed to be a road map to this court, a road map as to the path that the administrative law judge took in deciding certain findings of fact and conclusions of law.

THE COURT: Well, I think I indicated in my tentative decision, counsel, that I largely agree with you on that point and that I found the road map to be lacking in those areas in which the medical board disagreed with the administrative law judge. I could not determine from the board's decision the basis for their coming to the opposite conclusion from that that the administrative law judge reached in the matter.

MR. FRISENDA: Yes. I understand.

I also want to direct the court's attention though to tab 7, because one of the first items contained in the -- in the tentative ruling is the variances between the accusation and respondent's ultimate decision.

There are some 13 patients contained in the original accusation, which is tab 2. In three instances -- that is, with regard to three patients where revocation was ordered -- different violations were contained in the decision than what the petitioner was accused of. In the case of Karen G., petitioner was accused of dishonesty under 2234, subsection (e), false documents 2261, fraudulent intent 2262.

There was a passing mention at page 22, paragraph (c) of the accusation as to negligence. Negligence is never a

standard for revocation. It's gross negligence. It's a simple change --

THE COURT: Aren't repeated acts of negligence a ground for revocation?

MR. FRISENDA: If it's stated, your Honor, in an accusation, if it's stated among some 13 shotgun patients to be considered and ultimately the finding is incompetence. That's not what they charged her with. And due process requires that a person know what they're charged with and then have an opportunity to respond and to present witnesses.

Largely the accusation in this case was directed to an issue of billing, an issue as to whether or not the preservation of female reconstructive -- I'm sorry -- female reproductive organs should be a global billing or is it subject to line item analysis, separate

charges for each of the procedures that are necessary in restoring the Sistine Chapel as opposed to whitewashing the ceiling anew.

The same is true with regard to Deborah S., where petitioner was charged with dishonesty and false documents and fraudulent intent and a passing mention at page 24, subparagraph (c) on negligence. But the finding was gross negligence for Deborah S.

In the case of Alicia G., similarly petitioner was charged with false documents, fraudulent intent, dishonesty and a passing mention to negligence. And she was found --

THE COURT: Well, what do you do about Franz against the Board of Quality Assurance, the Supreme Court case decided in 1982?

MR. FRISENDA: Your Honor, that is tab number 1. And we're well familiar with Franz and we certainly agree with the court's analysis in Franz.

THE COURT: All right. Do you agree with the court's analysis regarding variance between accusation and proof as set forth in Franz?

MR. FRISENDA: We agree that in Franz, the issue that was presented was related to something contained in the accusation -- negligence, or gross negligence or incompetency. Franz was not charged with violation of billing practices and then convicted of something else. The court -- Supreme Court -- in Franz held that there was, if you will, sufficient noticed pleading, and they were dealing with one patient. One patient.

Dr. Gans and Dr. Hufnagel, in this action, were dealing with some 13.

THE COURT: Is there any evidence in the record that the petitioner was in any way prejudiced by these alleged variances between the accusation and the proof?

MR. FRISENDA: Your Honor, the record shows that in many instances, petitioner, through her attorney, had subpoenaed medical records from the treating physicians. And that due to inadvertence, mistake, excusable neglect, those records were never submitted during the course of the administrative proceeding.

THE COURT: What does that have to do with the variance between accusation and proof?

MR. FRISENDA: If she's charged with billings or some violation in billing,

those records are contained in her files. If she's charged with negligence or gross negligence or incompetency based on the second or third or fourth opinion of some other doctor and doesn't have the opportunity to know that up front and to examine thoe records and to take the necessary steps to respond to those charges, then she is prejudiced.

THE COURT: Well, what is there in the record to show this prejudice? The record shows a competent and spirited defense put on by the petitioner, witnesses produced in her own behalf, and documentation.

MR. FRISENDA: Let me --

THE COURT: Where is the evidence in the record before this court of prejudice caused by this variance?

MR. FRISENDA: All right. Your

Honor, if I might proceed to the rest of the pre-trial conference order.

Because this is the part which is paragraph 5 of the pre-trial conference order as to various stipulations which were entered into between counsel for Dr. Hufnagel and counsel for the respondent in this matter.

Indeed, this formed the basis for what later became so-called hypothetical facts which were never admitted into evidence in this court. If I might show you the exhibit 60 -- the exhibit 60 prepared by Mr. Merino, respondent's counsel, the so-called hyupothetical facts. That's all they were. They were just hypotheticals. They weren't admissible evidence and they never will be admissible evidence in

terms of what is contained in those hypothetical facts.

What I've done to assit the court at tab number 4 of the binder, is to take that copy which was identified only as exhibit 60 and show what portions were stipulated to, which are highlighted in yellow, and then what portions were not stipulated to, which is highlighted in that court's copy in pink, and show in the blow-up as underlined in red.

What the focus was contained in the accusation and the focus of petitioner's counsel was on billings, not on care and treatment rendered as to matters that she wasn't accused with. And those portions of these hypothetical facts that are underlined in red were not stipulated to as shown in the pre-trial conference order.

Now this pre-trial order at paragraph 5, laid out what portions were stipulated to and laid out the exceptions to those stipulations. And they were --

THE COURT: Well, what's the importance of this, counsel? I noticed the first thing that wasn't stipulated to was that on March 8th, 1985, Marcia C., a 34-year-old femal patient underwent a section curettage for an incomplete abortion. Now are you contending that those facts were not in evidence at the administrative level?

MR. FRISENDA: Your Honor, they were not in evidence and they were vigorously contested from a standpoint of three lives --

THE COURT: What in the world was contested; that Marcia C. was a 34-year-old female?

MR. FRISENDA: Obviously not, your Honor.

THE COURT: That she underwent a section curettage for an incomplete abortion?

MR. FRISENDA: Absolutely. And from that standpoint we focus -- and I think we all have a tendency to focus -- on the first page and the first three lines. If that's all we had to complain about, I wouldn't lose credibility with this court.

If the court allows me the 15 pages of these hypothetical facts, or what was shoveled under the nose by respondent's counsel of every expert who testified on the stand on their behalf, we had a faulty basis ab initio for these so-called experts. I don't profess to be an expert in medical malpractice cases,

and I don't know how familiar the court is with them to draw upon its own expertise. But I can tell you that when you shovel under the nose of some expert some hypothetical facts which were never admitted into evidence, and contested, that the expert's opinion is based on some hypothetical. And the expert opinion is just that. It becomes a hypothetical, not the standard which is necessary as announced in Ettinger, and not the standard that is announced in the other cases, which are cited by the petitioner.

Moreover, these hypothetical facts then graduated. They graduated in importance, not only from the standpoint of the reliance upon hypothetical facts by some experts used by respondent. but then they become a basis for the final

decision in this action.

It's comical, it's ludicrous, from a standpoint of taking the 28 days of time invested by the administrative law judge, Robert Neher, in considering all of these records and considering the testimony, and he then does his best job and he knows how to prepare a proposed decision.

In regards to the inconsistencies between the proposed decision and final decision, those are contained at tab 7. And those inconsistencies -- if the court refers to the fourth page of tab number 7 you will see how a case that was not established, as found by the administrative law judge, became established by a closed-door session of the board. At tab 7, this --

THE COURT: Well, I obviously know

that, because that's one of the findings of the board that I ordered stricken.

MR. FRISENDA: Yes, your Honor.

I think though the -- the process needs to be emphasized a bit because there aren't slight differences between the proposed decision and the final decision, but glaring differences. And the first instance of a glaring difference appears at Roman Numeral IV of the proposed decision, and then the final Roman Numeral IV paragraph of the decision rendered in August.

So paragraph IV by the administrative law judge found it was not established that respondent's attempt to suture the laceration and perforation on this asymptomatic, post-abortal patient, seven days later after the previous procedure constitutes gross negligence or

incompetence. Rather, it appears to be a judgment upon which reasonable physicians could disagree.

Even in 1985, reasonable physicians practicing in the field of gynecology could disagree. Yet the board in a closed-door session didn't adopt the proposed decision and at Roman Numeral IV of its final decision found it was established that respondent's attempt to suture the laceration and perforation on this asymptomatic, post-abortal patient, seven days later after the previous procedure constitute incompetence.

Those type of glaring, latent inconsistencies, based on the same facts -- based on the very same facts -- show that the board was simply acting in a prejudicial manner when it chose not to adopt the proposed decision. Those

glaring inconsistencies are contained throughout the tab 7, with regard to the paragraph Roman Numeral VII, which said "It was not established that respondent's performance of a uterine suspension on this patient in the face of uterine inflammation constitutes gross negligence or incompetence."

In the final decision at paragraph 7, in the closed-door session by the board, it found that it was established that respondent's performance of the same uterine suspension on the patient constitutes incompetence.

I won't bore the court with the details of those inconsistencies between the proposed decision and the final decision in view of the court's tentative ruling. And I can tell you that where the province of the administrative law

judge was uniquely situated to consider credibility of the witnesses and to hear what they had to say live and to simply throw that decision out on the same facts, the same record, without explanation can't be maintained by this court in review.

I do want to again stress and preserve -- and it may come back to a slightly sore subject -- the issue of a challenge that was made to the board at that closed-door session. I first presented this matter to Judge Lewin back in July of last year when that board, before even receiving a transcript, before even receiving evidence, issued a notice which simply stated, "In view of the -- this -- the proposed decision why the penalty shouldn't be increased..."

That was the statement made by

this board before it's closed-door session and before reviewing any of the evidence in the matter. I simply wanted to know what pressures were being exerted on the board members, if any, prior to their closed-door session.

And I did file -- and it's part of this record -- the appropriate challenges under the Government Code section, merely to find out are we dealing with an impartial panel, a panel of seven people that are appointed by the governor.

In filing that challenge I had to weigh petitioner's due process rights carefully. I'm experienced enough to know that those challenges and a request for challenge can be considered a very dangerous maneuver if it's just that, if it's just a maneuver. The

inconsistencies between the proposed decision and the final decision, based on the same sets of facts, bears out what I thought was a suspicion at the time.

I brought the matter up to Judge Lewin. And Judge Lewin stated that, "We don't know the answer. We might have a very fair-minded board in it's closed door session. So you haven't convinced me yet that they're going to do something that harms Dr. Hufnagel's vested right to practice."

When I came back to Judge Lewin, as he suggested -- he suggested, "Come right back to me if they do what you fear," it was respondent, it was Mr. Merino who exercised his peremptory challenge.

THE COURT: I don't follow your argument on this point either, counsel,

as I think you can see from the tentative.

MR. FRISENDA: Well --

THE COURT: This court, on a daily basis after hearing one side, issues orders to show cause, which say, in effect, the other side is ordered to appear in this court on a certain date and show cause why it should not be enjoined from doing something ordered to do something.

Now is it your contention that whenever the court issues such an order it is pre-judging the controversy that it is going to hear at the hearing?

MR. FRISENDA: Absolutely not, your Honor.

THE COURT: Well, what's the distinction between an order to show cause of the type the court issues and

the order that this board issued?

MR. FRISENDA: Because you heard something about the case before you issued the order to show cause.

In this instance, the board issued its order to show cause before hearing anything --

THE COURT: Well --

MR. FRISENDA: -- before considering any of the evidence, because the --

THE COURT: The board did have before it at that time, I take it, the proposed decision of the administrative law judge.

MR. FRISENDA: And that's all. It did not have the transcript. Indeed, the transcript wasn't even prepared until --

THE COURT: But what is the board pre-judging, Mr. Frisenda? What is the board doing other than setting the matter

for a hearing and directing the parties to the precise question which it is interested in, which is based upon this decision, please direct your argument to why the penalty should not be increased?

MR. FRISENDA: Well, your Honor, the problem is that when you focus in on penalty the Government Code says you need a transcript in order to do that. In other words, that -- there would be no problem if the OSC simply said, "Come back to me and we want to hear these issues concerning incompetency," or "these issues concerning alleged gross negligence." But the board wasn't interested in that.

The board wasn't interested in the proposed decision of the administrative law judge who heard the evidence and heard the testimony, because

they scrapped that. They didn't adopt it. And they didn't adopt it just with one purpose in mind, and that one purpose was to increase the penalty, which they ultimately did. So what --

THE COURT: Well, the transcript was ultimately ordered and a hearing was ultimately held before the board issued is final decision; isn't that so?

MR. FRISENDA: Yes, your Honor. That is -- that is true. And during that process where was petitioner's right of due process? When the board simply received that challenge, but didn't read it, there was no opportunity -- to find out what exactly the board members had heard about the case in the press, what telephone calls they had received from influential people from the California Medical Association, who had made verbal

threats directly to petitioner in terms of her campaign -- as some people call it, a crusade, a crusade from a standpoint of a conservative approach in dealing with female reproductive surgery.

THE COURT: Well, this matter is here for trial after a petition has been filed and after rights of discovery have been available and exercised. Why should I assume at this stage of the game that this board was pressured by anybody or did anything improper? There's no evidence of that before me, is there?

MR. FRISENDA: Your Honor, we were not allowed to take that evidence. I had requested that right from a standpoint of the day I presented that challenge. And they told me that the rule of necessity says that we don't have to consider it. Let's --

THE COURT: Who told you?

MR. FRISENDA: The presiding officer at the motion for reconsideration, which was held at the Holiday Inn Hotel.

THE COURT: No. I'm talking about this court proceeding, counsel. There's no evidence before this court, even after rights -- the full panoply of discovery rights have been available in this case -- there's no evidence before this court that the board was under pressure from outside sources or did anything else improper.

MR. FRISENDA: Well, your Honor, I tell you that I was told definitively by the administrative law judge and I was told definitively by Judge Lewin, that I did not have that right, the right, in essence, to voir dire the panel members and to find out whether or not they had

received evidence which might prejudice them one way or another.

I believe this court and your Honor to be extremely forthcoming and candid with petitioner. Your Honor came out and complied with what we believe is the canons of judicial ethics from a standpoint of announcing whether or not a family member or someone in the household may have had some contact, no matter how remote it may be, some contact that might influence your Honor's decision or it might have some appearance of a conflict, enough to be investigated. That's -- that's all we asked for.

If I were to ignore reality, ignore reality of the fact that this case for a long time has been tried in the media and has been tried in newspapers and has been tried on T.V., without ever giving the

petitioner an opportunity to respond, I believe that under the circumstances in a high profile case that petitioner had the right -- had the right to find out whether the members of the board were acting improperly. Just to find it out. We're reasonable people.

THE COURT: Well, I mean, did you make any attempt to find it out by discovery or otherwise? And were you thwarted in that attempt by some order of the court or otherwise?

MR. FRISENDA: Your Honor, I presented the matter to Judge Lewin. And I presented the matter next to the administrative law judge. At the time I presented the matter to --

THE COURT: Well, by presented the matter, what did you present? Did you make some sort of an application for

discovery that was denied?

MR. FRISENDA: I made the appropriate application under the Government Code section, which I believe -- I think it's 11514, subsection (c).

THE COURT: What does that say?

MR. FRISENDA: Well, it says, in essence, what one -- 170 of CCP says. That is, from a standpoint of where you have some concern that the jury or these peers may be acting not in an impartial manner, that we have that right to at least inquire.

And what Judge Lewin said to me, and I think it's reflected in the transcript, is, "If you're right, Mr. Frisenda, how are you going to unring the bell? Who is going to hear the matter if you disqualify seven panel members?"

And what I said to Judge Lewin

is, "We're not intending to disqualify all seven panel members. It may be that just one of the seven. It may be just two of the seven. And it may be that none of the seven had any of these concerns or biasness one way or another, vis-a-vis petitioner's case." All we wanted was the opportunity, which I think every litigant deserves to have their matter presented to an impartial fact finder.

In this instance, when the panel chose not to adopt the proposed decision, and indeed to scrap it, to put it in a locked closet, they were usurping the unique authority that the administrative law judge had when he heard the live testimony and considered the 28 days of testimony and facts and evidence in the case.

Be that as it may, in view of your Honor's tentative decision in this matter, that's the -- that's all I have to say in the opening argument.

THE COURT: All right. Thank you, counsel.

Mr. Merino.

MR. MERINO: Thank you, your Honor.

We've reviewed the tentative decision and we note that on one of the patients -- and that would be Rama H. -- and that's finding 14 at pages 5 to 6 of the decision, for which a penalty of revocation was assigned, the court's tentative is to uphold that court.

We submit that under Franz -- before I get into the argument that related to the other counts -- where a single patient had a single discipline, and it was unclear to the court, because

two out of six of the gross negligence counts were being brought, that's why the Franz court remanded.

Here we have one count on Rama H. -- one patient with multiple counts, actually -- being up held by this court. The division -- the board -- made it clear to this court that the penalty of revocation under Rama H. was a separate -- separately determined penalty just for that one count. We submit that would be sufficient to uphold the board's decision of penalty, because it is a separate count.

Furthermore, under the decision of Williamson v. BMQA, a recent appellate case, 217 Cal.App.3d 1343 at 1348, it's clear that on the issue of penalty the board doesn't have to make specific findings related to that penalty. That

case sets forth, reiterates the review of the penalty by the court.

I think the message from that opinion and from the other opinions in where there is no doubt what the penalty of the board would be there is no point in remanding. If the Rama H. count is upheld, then I think under Franz the penalty of revocation should be upheld.

There is a comment in the tentative decision regarding Dr. Hummer, and weight and credibility given to his opinion. We have dispute with that. The dispute is that Dr. Hummer's opinion was based on repeated assumptions that were not borne out of the record. They were contradicted at times by Dr. Hufnagel's own testimony or own records.

To that extent the board was entitled to disregard his opinion,

however worthy it might be, if the evidence did not support it.

I have various examples, but in the cases of Karen G., Dr. Hummer's opinion was based on Karen G. not having a heart beat during the surgery. In the case of Marcia C., Dr. Hummer's opinion was based on Marcia C. having symptoms at the time she presented to Dr. Hufnagel, which were contradicted by the patient, contradicted by the records.

The other point I would like to raise to this court is Dr. Hufnagel's total impeachment. And that is a factor in the penalty of revocation that the board is assigning. There are very specific findings regarding her impeachment, her crusade. Counsel is right, Administrative Law Judge, Judge Neher spent considerable hearing time

with petitioner, Dr. Hufnagel.

Dr. Hufnagel testified for four days. His evaluation of her credibility is worth a lot. The board adopted those findings. Petitioner has been unable, apparently, to respond to those severe findings which impeach her credibility. We submit it's because she cannot.

I need to correct a couple of items that counsel referred to in his argument. Repeated negligence acts were charged in this case. This case was not about billing; the decision does not involved global billing. That was one of the charges which has been dropped.

We submit that the board made it very clear in this decision that the decision could be upheld if any one of the revocation counts, per patient, was upheld -- the Rama H. patient, revocation

is being upheld. The revocation should be upheld.

We submit that as far as petitioner's inability to present a defense where there was a variance, the record does not support that. I have cites, if your Honor wishes, to -- where her experts rescinded a defense on those charges and responded either that there was no incompetence or no gross negligence related to that.

We submit that the decision should be upheld. The public must be protected. Petitioner's license was correctly revoked, if by nothing else, on the count involving Rama H.

THE COURT: All right. Thank you counsel.

All right, Mr. Frisenda, let's hear from you with respect to Rama H.

Counsel's point there is that with respect to that patient there was no variation between the findings of the administrative law judge and the findings of the medical board. And the medical board decided that the penalty for that -- for the acts committed with respect to that one patient was to be unconditional revocation on the license. Now why shouldn't the court uphold that?

MR. FRISENDA: Well, your Honor, as I pointed out before, the expert's testimony, which was received by Judge Neher, was based on hypotheticals. They weren't based on hypotheticals. They weren't based on admitted evidence nor admissible evidence. And indeed this court has --

THE COURT: Well, is there some testimony, some expert testimony with

respect to Rama H., which you contend was inadmissible and was wrongly considered by the administrative law judge and by the board?

MR. FRISENDA: Yes, your Honor.

THE COURT: Is so, what is the evidence?

MR. FRISENDA: Well, if we could focus to tab 4.

THE COURT: Tab 4.

(Pause.)

MR. FRISENDA: First and foremost, I do not want to point out that the court has found that there is not the analytical road map which is necessary in the decision in which to find on what basis the board revoked the license of Dr. Hufnagel.

THE COURT: Well, I found that with respect to the patients other than Rama

H.

MR. MERINO: Yeah. Your Honor --

THE COURT: But with respect to Rama H., which is the patient that Mr. Merino points out in his closing argument, I did not detect any variation between the facts which were found by the administrative law judge and those found by the board.

MR. FRISENDA: Your Honor, if I might first direct the court's attention to the decision in Franz, where the Cal. Supreme Court states at headnote 12 -- and that would be page 145 of the decision --

(Pause.)

MR. FRISENDA: The court in Franz says -- against reading from page 145 of the decision:

"If an agency has imposed a single

discipline for multiple charges, some of which are not found" -- I'm sorry -- "some of which are found not sustained by evidence, there is a real doubt whether the same action would have been taken on proper findings. The matter will be returned to the agency for redetermination of penalty."

THE COURT: That's right. That's what the Franz court held. And it was, I think, to preserve the decision from that defect that the board decided a penalty for each patient individually, rather than take the approach that the administrative law judge had taken, which was to decide a penalty based upon all of the evidence on all of the patients. It seems to me that that's something that the board had the right to do.

MR. FRISENDA: Well, the board first scrapped anything that the administrative law judge found. When they --

THE COURT: Well, that's not true. The board -- if you compare the decision of the board with the decision of the administrative law judge, the board adopted, in fact, most of what the administrative law judge found.

MR. FRISENDA: I don't think that --

THE COURT: Verbatim.

MR. FRISENDA: I think in some parts they did and some parts they have changed day to night. When they found it was -- it was not established or was established --

THE COURT: All right.

MR. FRISENDA: -- if we're taking the court through.

THE COURT: There were some parts

which they changed, and I think you have identified those. And I tried to do that in my tentative, too.

MR. FRISENDA: Okay.

THE COURT: But the point is that with respect to the patient Rama H., there was no discrepancy, at least that's what Mr. Merino tells us.

MR. FRISENDA: All right. Your Honor, again, I point out that the testimony on Dr. -- I'm sorry -- the testimony concerning Rama H. was based on hypotheticals which were not admitted into evidence. Indeed, those hypotheticals --

THE COURT: Well, I'm looking at your tab 4 under Rama H., which begins on page 3. And with respect to Rama H., most of it is yellow and very little of it is pink.

MR. FRISENDA: But those portions that are pink are obviously significant in terms of what exactly was contained in hypotheticals that led certain experts to testify a certain way. So when that hypothetical used the terms, "with a pre-operative diagnosis," that language was taken verbatim from the accusation at paragraph 16(b). And the only problem is that that was never found in terms of admissible evidence.

The same thing is true with regard to the other portions which are underlined; that is, the fact that approximately in May of 1985, respondent caused billings to be submitted, et cetera. If there is no admissible evidence from a standpoint to support that decision, if it turns out that the testimony on the part of the experts for

respondents were just hypotheticals, then indeed there is no fact basis for the board's decision as to Rama H.

There's enough of a question -- there's enough of a question in the decision and based on what is presented here to direct that board to go back and tell us -- tell us -- that is, tell the court in terms of the analysis that it conducted so that we have a record to be reviewed and we have a decision to be reviewed.

If I might as well, I would like to consult with Dr. Hufnagel just briefly so that I might respond to those specific comments that are addressed by the respondent.

(Pause.)

THE COURT: All right. Well, go ahead. Do it quickly.

MR. FRISENDA: Okay.

THE COURT: I'm not going to pause in the proceedings at this point.

(Pause.)

MR. FRISENDA: Your Honor, if the court would permit, I would like to have Dr. Hufnagel respond in part as to Rama H. In particular, I understand that the expert for the facts which were related to the board was by either direct or indirect evidence presented by Dr. Weinberger. And Dr. Weinberger was one of the doctors that was impeached during these proceedings.

I think from a standpoint of whether or not Dr. Hufnagel refused to perform a hysterectomy on Rama H., and the facts and circumstances underlying that decision, it's obviously important. And if the court would permit, I would

like her to address the court on that one single issue.

THE COURT: No. That request is denied. This is the oral argument phase of this trial. The petitioner is represented by counsel and it's counsel's responsibility to make the closing argument.

THE COURT: Not the client's.

MR. FRISENDA: -- try my best from a standpoint of these detailed facts and relate them to your Honor.

The respondent, at page 9 of its brief, stated that Rama H. consulted with Dr. Hufnagel for a second opinion. The facts in the record controvert the respondent's position. Rama H. had already previously had three prior opinions and was seeking care from Dr. Hufnagel as a surgical specialist to

avoid a hysterectomy. And this is found in Dr. Weinberger's records at exhibit 57, page 1.

A collateral procedural issue is that Dr. Hufnagel did not receive either Dr. Weinberger or Dr. Lazarus' records concerning Rama H. during the discovery process, and that she was not forwarded them for review in a timely manner.

Volume 5, page 75 and exhibit 57, page 51, support the fact that Rama H. was seen by Dr. Goldin Turnig and Sheldon Haas, who both suggested hysterectomy. Rama H. had been followed by Dr. Weinberg -- Dr. Weinberger -- to avoid a hysterectomy for a uterine mass, which is shown by exhibit 57.

The respondent in its brief at page 10 further stated that Rama H. had

been advised of her condition and that she had received the options of hysterectomy or myomectomy. However, this is controverted by Rama H.'s own testimony at volume 15, page 37, line 23. Dr. Weinberger recommended a hysterectomy.

Rama H. goes on to testify that on January 2nd, 1985, quote, "He told me that it was the only way he knew to treat me."

The respondent goes on to note that Dr. Weinberger had followed the patient since 1982. The facts, however, and further testimony at volume 8, page 40 and per the records in exhibit 57 note that Rama H. had been followed since April 1, 1981.

On page 10 of the respondent's brief, it is noted that Dr. Weinberger

scheduled the patient for a total hysterectomy. This fact is controverted and misstates the true facts.

In volume 8, page 41, line 20, Dr. Weinberger stated that he observed Rama H.'s condition until January of 1985. In volume 8, page 42, Dr. Weinberger states that he had seen Rama H. on December of 1985.

In volume 8, page 44, he testified that Rama H. was scheduled on January 15th, but that he did not have further contact. This is a one-year contradiction in dates and Dr. Weinberger's own testimony. In fact, in volume 5, page 77, what had occurred was that Rama had called to schedule a surgical time, but she never was seen post-op -- pre-operatively, nor did she meet nor talk with Dr. Weinberger's

staff, and in fact, he refused a total hysterectomy.

Rama H. was a woman who wanted to keep her ovaries, and that is -- this is noted in volume 15, lines 21 through 27 of the administrative record. Also, it is further supported by the form noted at exhibit 57. The form noted in Dr. Weinberger's records is unsigned by Dr. Weinberger himself. And again, this is noted at 50- -- page -- I'm sorry - exhibit 57, page 9.

The respondent tries to present a narrative of Dr. Hufnagel pushing a patient into a surgery that she did not want. In this narrative the respondent infers that the patient was persuaded by Dr. Hufnagel to undergo a myomectomy. However, Rama H.'s own testimony at volume 5, page 43, states that this

procedure was recommended.

Furthermore, it was noted Dr. Weinberger, in testimony, as well as in his records, also recommended a myomectomy as seen in exhibit 57, page 8.

In addition --

THE COURT: The conduct found to have constituted gross negligence by both the administrative law judge and the board in the case of Rama H. is not the performance of the myomectomy, but the refusal of the petitioner to perform a hysterectomy and the refusing and failing to give the patient a clear option as to treatment choice.

MR. FRISENDA: Your Hon- --

THE COURT: The refusal to disclose the need for further surgery and ignoring the condition of the patient in favor of respondent's preconceived notions, right

or wrong, of the general condition of obstetrics and gynecology in the medical community. And the billing of $10,550 to the patient in -- which included billings for procedure that were not performed. Those are the acts which both the administrative law judge and the board found in the case of Rama H.

MR. FRISENDA: But, your Honor, those facts were in part the subject of those hypothetical facts which were never admitted nor received into evidence. I can go on, obviously, rather lengthy --

THE COURT: Well, what hypothetical facts? I mean, what were these -- what were these findings based upon that was not in evidence?

MR. FRISENDA: Well, the -- this is from the decision and the decision at paragraph Roman Numeral XX stated,

"Approximately in May of '85 respondent caused billings to be submitted for treatment rendered to Rama H. in the amount of $10,550," and then goes on in terms of what the content of the billing was.

Those were facts contained in the hypothetical. Those were facts which were disputed by petitioner. And those are facts upon which this penalty is in part based. Obviously, although it may be a --

THE COURT: What is your contention as to what the evidence showed with respect to the billings to Rama -- for the treatment rendered to Rama H.?

MR. FRISENDA: Well, first off, as respondent indicated, that the amount of billing -- that is, whether this is line item billing or global billing is not the

-- it's something that they withdrew.

THE COURT: Well, that's got nothing to do with the findings here. The findings simply are -- and the finding apparently that you're challenging is that --

MR. FRISENDA: The --

THE COURT: -- the petitioner caused billings to be submitted for her treatment of Rama H. in the amount of $10,550.

MR. FRISENDA: It's the content that is going on from there. It is what procedures were performed and contained in those billings, which are also disputed by --

THE COURT: No. The only thing that's important as far as the findings are concerned is that those billings included a billing for an enterotomy and

endometrial biopsy which were not performed.

MR. FRISENDA: Well, those were procedures that were disputed; that is, disputed as to whether or not they were performed.

Let's come back to the original basis of whether or not Dr. Hufnagel refused to perform a hysterectomy. The testimony of Rama H. is that alternatives were recommended. Obviously, nobody, I think, can show the clear and convincing evidence which was presented to the administrative law judge that Rama H. didn't have an option as presented by Dr. Hufnagel in her consultation with the patient. Rama H. used the word recommended. And if a procedure is recommended, that is a matter of choice. It's a matter of choice to the patient

and a matter of discretion or judgment as the -- on the basis of Dr. Hufnagel as the consulting surgeon.

I can, again go on in terms of the detail contained in the administrative record. Perhaps it would be beneficial to the court if we were allowed to submit a brief that contains those items so that I don't have to belabor this point, But obviously, the administrative record, both in testimony and in evidence, is replete with instances which would wipe away the underpinnings of the board's so-called findings contained in this decision.

THE COURT: All right. Thank you, counsel.

(Pause.)

THE COURT: The medical board ordered unconditional revocation as the

penalty for the treatment of six patients, each of six patients treated by Dr. Hufnagel. The court has found discrepancies or differences between the findings of the administrative law judge and the medical board with respect to five of those six patients.

With respect to Rama H. it is certainly, I think, correct, as Mr. Merino points out, that there is no difference. But I don't think that this court could -- can be -- that this court can be certain and this court is not convinced that if Rama H. were the only patient involved in this proceeding, that the board would have ordered unconditional revocation of the doctor's license to practice medicine.

The one thing that comes through the loudest and the clearest from

the court's independent examination of the administrative record is the petitioner's venality, her repeated continuous and systematic billing of patients for procedures that were not performed and double billing for procedures that were performed once.

There is no doubt, I think, on the basis of the evidence before the court that the petitioner was engaged in the systematic fleecing of the insurance companies that were fortunate enough to issue policies to the patients that came to her.

If the medical board had decided that such conduct merited the revocation of the petitioner's license this court, frankly, would have been included to approve the decision of the board. The board, however, there is

nothing in the findings or decisions of the board to indicate that this conduct on the part of the petitioner is what did induce the board to order the revocation of her license.

The revocation, as I say, was ordered in -- for the acts that were done by the petitioner with respect to six patients. And the respondent's findings with respect to Marcia C., Jolina C., and Christine S., are as Mr. Frisenda points out, entirely conclusory, show no basis for the conclusions that the board reached, which were contrary to the conclusions of the administrative law judge and, therefore, do not provide a satisfactory basis for this court to review the matter.

When the administrative law judge finds on the basis of the evidence

that he heard that what the petitioner did not constitute incompetence and the medical board simply makes a finding that these same acts did constitute incompetence without any indication as to why, there simply is not enough information made available to this court to review the decision of the board to make the determination that it is correct and the administrative law judge is wrong.

Furthermore, it is, I think, at least inferable, since the medical board didn't have anything before it that the administrative law judge did not, that the medical board was relying upon the expert opinions of its members, or some of its members, in the instances in which it disagreed with the administrative law judge.

But our Supreme Court in Franz against the Board of Medical Quality Assurance has specifically held that when the medical board does that, due process requires that the medical board give notice to the petitioner that it intends to rely upon its own expertise and give the petitioner an opportunity to rebut whatever that expertise is. And there is no such notice or opportunity given in this matter.

Therefore, with respect to five of the six cases in which the board ordered the conditional revocation of the petitioner's license, findings upon which those -- that penalty -- was based have been ordered stricken by this court. Those findings 4, 7, 13, 31, 47 and a portion of finding 50.

Now except for those findings,

the findings of the board are sufficient. And based upon the court's independent review of the administrative record, the remaining findings are in accordance with the weight of the evidence and are sustained.

But when the findings that I have enumerated are deleted there is no basis stated in the administrative decision for the unconditional revocation of petitioner's license to practice medicine; that is, other than the findings with respect to the one patient, Rama H. And this court finds that it is simply not certain, based on this record, that the same unconditional revocation of the license would have been meted out by this board if Rama H. were the sole case -- the sole patient -- being considered here.

Accordingly, it is the decision of this court that a writ of mandate issue ordering the respondent board to modify its decision of August 14th, 1989, by replacing findings 4, 7, 13, 21, 47 and the last paragraph of finding 50 with findings that set forth the reasons for the board's disagreement with the findings of the administrative law judge and the evidentiary basis for such disagreement.

If the evidentiary basis for such disagreement includes reliance upon the expertise of members of the respondent board, then the respondent is ordered to give the petitioner notice of its intention to rely upon such expertise and an opportunity for rebuttal.

In the alternative, the respondent may modify its decision of

August 14th, 1989 by deleting therefrom findings 4, 7, 13, 21, 47 and the last paragraph of finding 50, and by deleting its order for the unconditional revocation of petitioner's license and substituting therefore an order that such revocation be stayed on condition that petitioner comply with the terms and conditions of probation set forth elsewhere in the board's decision for a period of five years.

To the extent that it requests any different or further relief, the petition is denied.

The court's tentative ruling, furnished to counsel at the beginning of argument, will constitute the court's statement of decision in this matter.

MR. MERINO: Your Honor, may I request reconsideration based on the

argument of Rama H. and Franz and in light of the court's comments on the dishonesty and the venality aspects? I don't think I've had a fair opportunity to really address the issues from that light.

THE COURT: Well, I'm not going to hear any further argument, counsel, at this time. I think --

MR. MERINO: Your Honor --

THE COURT: The court has considered those issues based upon the written argument of counsel.

MR. MERINO: Well, your Honor, I -- in light of the fact that the Rama H. count was not part of the tentative or the reasoning of the tentative, I would request that your Honor take it under submission and review the Williamson case, which I had cited to previously,

and the Franz case and take into account that the penalty reflects all of the findings of dishonesty which are being upheld. There was no disagreement between the division and the administrative law judge with respect to those. The only disagreement was on the medical aspect.

THE COURT: I understand that.

MR. MERINO: And I would request reconsideration and your Honor to take it under submission to review that case.

THE COURT: The request is denied. The court's decision will stand.

MR. FRISENDA: Thank you, your Honor.

THE COURT: Court is in recess.

(Proceedings concluded.)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPART. NO. 86 HON. DAVID YAFFE, JUDGE

| | | |
|---|---|---|
| V. GEORGES HUFNAGEL, M.D., Plaintiff, | ) | NO. C 730 624 |
| vs. | ) | |
| STATE OF CALIFORNIA, etc., et al., Defendants. | ) | |

| | | |
|---|---|---|
| STATE OF CALIFORNIA | ) | |
| | ) | ss. |
| COUNTY OF LOS ANGELES | ) | |

I, MARIE FOX, a duly designated transcriber, do hereby declare and certify under penalty of perjury that I have transcribed the portion of tapes 1 and 2 which were duly records in the Superior Court of the State of California, County of Los Angeles, Department 86 on the 18th day of May, 1990, in the above-mentioned case, and

that the foregoing 73 pages comprise a true and correct, accurate transcription of the aforementioned tape.

Dated this 30th day of May, 1990.

/s/

Transcriber

**PROOF OF SERVICE**

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California, United States of America. I am over the age of 18 and not a party to the within action; my business address is 11755 Wilshire Blvd., 10th Floor, Los Angeles, California 90025.

On December 31, 1994, I served all the parties in the within action the foregoing document described as:

**APPENDIX (VOLUME I)**

by placing the true copies thereof enclosed in sealed envelopes and deposited via Federal Express addressed as follows:

3 copies - Antonio Merino, Esq.
Office of the
Attorney General
300 South Spring Street
Suite 5212
Los Angeles, CA 90013

Supreme Court of the
State of California
300 South Spring St.
Los Angeles, CA 90013

Executed on December 31, 1994, at Los Angeles, California.

Donna Misenhimer